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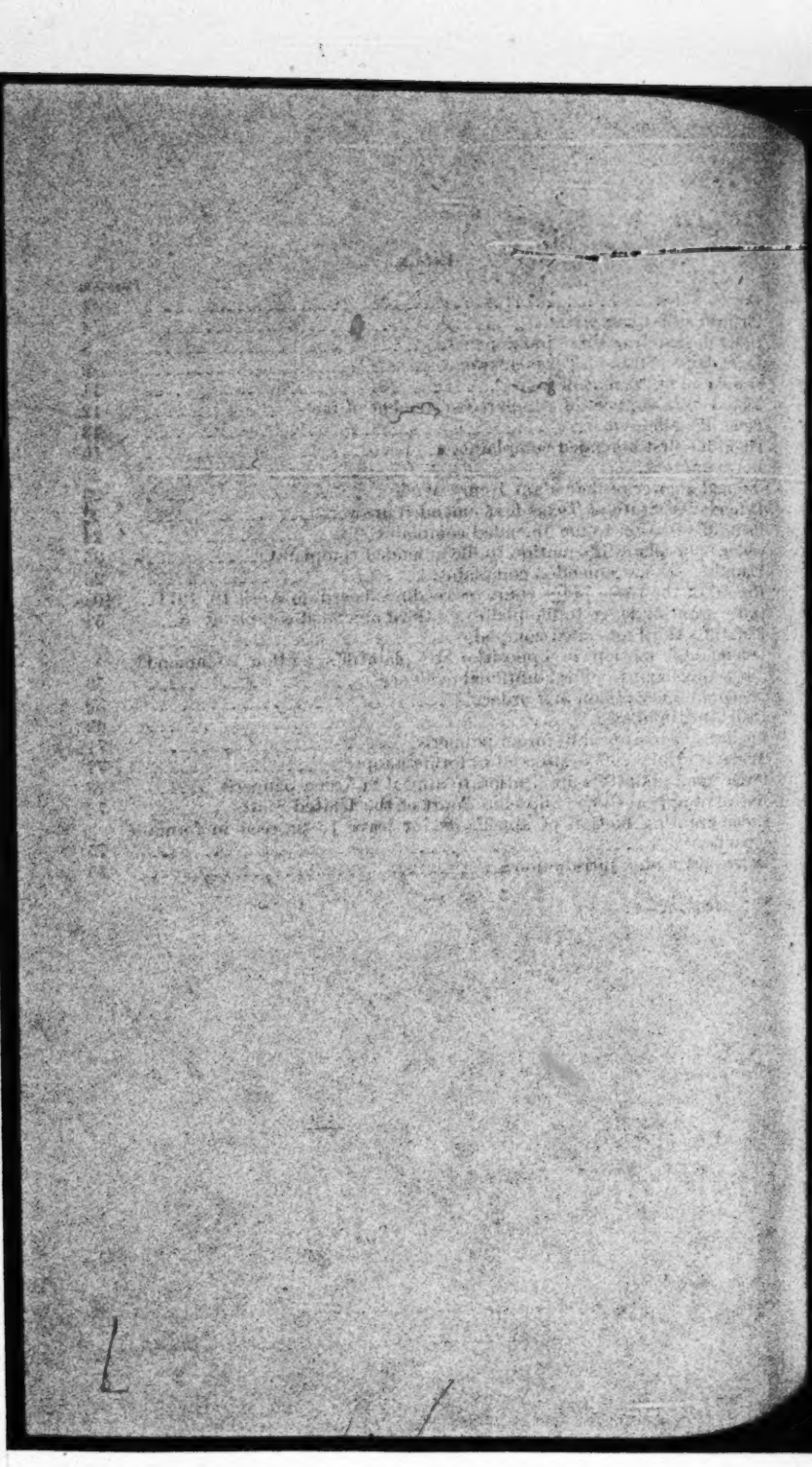

Civil Docket

United States District Court

CA-3-4336-B

Sarah T. Hughes, Judge *Robert M. Hill*, Judge *Homer Thornberry*

LINDA R. S., SUING ON BEHALF OF HERSELF AND HER MINOR DAUGHTER, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

v.

RICHARD D., AND THE STATE OF TEXAS

ED: HENRY WADE & JUSTICE ROBERT CALVERT 3/71

Attorneys

McKool, McKool, Jones, Shoemaker & Turley. By: Windle Turley, 2000 McKool Building, 5025 North Central Expressway, Dallas, Texas 75205 521-750, for plaintiff.

Pat Bailey, P.O. Box 12548, Capitol Station, Austin, Texas 78711, for State of Texas; for defendant.

John B. Tolle, Assistant District Attorney, Dallas County Courthouse, Dallas, Texas 75202, for Henry Wade;

Statistical record	Costs	Date	Name or receipt No.	Rec.	Disb.
		1970			
J. S 5 mailed Dec. 31, 1970.	Clerk.....	12-3	M.M.J.S..	1500	.....
		12-15	SF201 CL		1500
		1971			
J.S. 6 mailed.....	Marshal....	11-30	Forma Pauperis	.....	(Appeal)

Class Action-Request 3-Judge Court. Basis of Action: 9th & 14th. Amendments to U.S. Constitution. Seek Declaratory Judgment. Holding Texas Child Support Laws. Action arose at; unconstitutional. Injunctive relief; costs.

Docket fee.....

Witness fees.

Depositions.....

Date	Proceedings
1970	
Dec. 3	File plaintiff's first complaint and issued summonses (2)—The State served by serving the Attorney General and the Governor.
Dec. 8	Filed marshal's return on summons executed December 5, 1970 by serving Richard Dobenbaugh, Jr. by delivering to Barry Bearden, assistant.
Dec. 14	Filed marshal's return on summons (2) both executed December 9, 1970 by serving Alfred Walker, designated agent for Attorney General Crawford C. Martin; and by serving Bob Bullock, designated agent for the office of the Governor.
Dec. 18	Filed order designating Judges Hill and Thornberry for 3 judge panel. JRH.
Dec. 22	Filed answer of State of Texas.
1971	
Feb. 26	Filed brief for plaintiffs (copy sent to all judges).
Mar. 15	Filed brief for State of Texas.
Mar. 22	Filed stipulated statement of facts.
Mar. 22	Filed affidavits of Robert Goldsteinberg, Albert Dunagan, Linda R. S. and testimony of Burton G. Hackney in support of allegations.
Mar. 23	Filed pl's first amended complaint with leave granted by STH, adding Henry Wade and Justice Robert Calvert as defendants.
Mar. 25	Issued summons to Henry Wade and Justice Calvert and given to U.S. Marshal.
Mar. 29	Filed marshal's return on amended complaint executed Mar. 26, 1971 by serving Henry Wade, Dallas Co. D.A., by del. to Douglas Mosher.
Apr. 2	Filed original answer of defendant Henry Wade.
Apr. 5	Filed defendants (State of Texas) first amended answer.
Apr. 6	Filed plaintiff's motion to file amended complaint and order granting. STH
Apr. 6	Filed plaintiff's second amended complaint.
Apr. 20	Filed marshal's return on amended complaint executed Apr. 19, 1971 by serving Chief Justice Robert Calvert by del. to G. R. Jackson.
May 26	Filed order granting plaintiff leave to file third amended complaint. STH.
May 28	Filed plaintiff's third amended complaint.
June 3	Filed by State of Texas motion in opposition to plaintiff's motion to amend pleadings and to offer additional evidence.
Nov. 1	Filed memorandum opinion and order by Judges Thornberry and Hill.
Nov. 1	Filed dissenting opinion by Judge Hughes. Copies mailed to attorneys.

Date	Proceedings
1971	
Nov. 10	Filed plaintiff's application to appeal in forma pauperis.
Nov. 29	Filed order granting plaintiff's application to appeal in forma pauperis FMH: Magistrate.
Nov. 29	Filed plaintiff's notice of appeal to the Supreme Court of the United States.
Dec. 15	Filed plaintiff's 4th amended complaint and first supplemental brief.
Dec. 16	Filed transcript of proceedings held April 16, 1971 (Hearing).
1972	
Jan. 10	Mailed complete record to Supreme Court with transcript. (No exhibits).
Jan. 11	Filed Copy 5 of CJA 21. Original mailed to Administrative Office by Odell Oliver.
Feb. 15	Filed motion to intervene by State of Texas.
Mar. 8	Filed order directing all parties to file briefs by April 15, 1972. Reply to be filed 10 days after brief is filed if so desire to file a reply brief. Deposition of plaintiff shall be taken at a convenience to the parties. (Copy mailed to attorneys of record).
Apr. 17	Filed intervenor's brief.
Apr. 24	Filed certified copy of order from Supreme Court: "Upon consideration of the motion of the appellants for leave to proceed herein in forma pauperis, it is Ordered by this Court that the said motion be, and it is hereby, granted."
Apr. 26	Filed certified copy of order from the Supreme Court: "The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits."
May 1	Filed plaintiff's second supplemental brief.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

LINDA R. S., suing on behalf of herself and her minor daughter, and on behalf of all others similarly situated, Plaintiff,

v.

Richard D., and the State of Texas, Defendants.

Civil Action No. 3-4336-B (Filed December 3, 1970)

Plaintiff's First Complaint

I. PARTIES

1. Plaintiff, Linda R. S. is a citizen of the State of Texas, and a resident of Dallas County, Texas.

2. Plaintiff's minor daughter is a citizen of the State of Texas and resides with Plaintiff in Dallas County, Texas.

3. Plaintiff sues on behalf of herself, her minor daughter, and on behalf of all other women and minor children who have sought, are seeking, or in the future will seek to obtain support for so-called illegitimate children from said child's father. The number of members of the class is large and joinder of all members is impractical; there are questions of law and fact common to each class; the claims of Plaintiff are typical of such class; and the named Plaintiff will fairly and adequately protect the interests of the class.

4. Defendant, Richard D., is a citizen of the State of Texas and a resident of Dallas County, Texas.

5. Defendant, State of Texas, is a party hereto in that certain laws and enactments of the State of Texas infringe the Federal Constitutional rights of Plaintiff, Plaintiff's minor daughter, and others similarly situated. Notice of this suit is given to Honorable Preston Smith, Governor of the State of Texas, and to Honorable Crawford Martin, Attorney General for the State of Texas.

II. JURISDICTION

1. Plaintiff invokes the jurisdiction of this Court under the NINTH and FOURTEENTH Amendments to the United States Constitution; and under Title 28, United States Code, Sections 1331, 1343, 2201, 2202, 2281, and 2284; and Title 43, United States Code, Section 1983.

2. Plaintiff seeks (a) a Declaratory Judgment that Article 4.02 of the Texas Family Code, and Article 602 of the Texas Penal Code are unconstitutional on their face, and have been unconstitutionally applied so as to systematically exclude unwed mothers and children of unwed mothers from the benefits of such laws; (b) a permanent mandatory injunction to prevent the further exclusion of such class of persons from the protection of the laws of the State of Texas.

III. STATUTES

1. Article 4.02 of the Texas Family Code provides:

> *"Each spouse has the duty to support his or her minor children.* The husband has the duty to support the wife and the wife has the duty to support the husband when he is unable to support himself. A spouse who fails to discharge the duty of support is liable to any person who provides necessaries to those to whom support is owed."

2. Article 602 of the Texas Penal Code provides:

> "Any husband who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his wife who may be in necessitous circumstances, or any parent who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not more than two years."

IV. FACTS

1. Plaintiff and Defendant, Richard D., cohabited for a period of several months in 1969 and 1970 during which time Plaintiff became pregnant by the Defendant, Richard D.

2. On October 3, 1970, Plaintiff gave birth to a girl baby, of which child Richard D. is the father.

3. Although requested by Plaintiff many times to do so, Defendant, Richard D., has refused to either marry Plaintiff or support their minor daughter.

4. Plaintiff has very little money and cannot support the parties' minor daughter in a manner equal to the opportunities and privileges of a father supported child.

5. Plaintiff's minor daughter is not entitled to receive and in all reasonable probability will not receive support from any source other than her natural parents.

6. The laws of Texas as written and as applied give the Plaintiff's child no rights of support from her father, but said laws do provide other children that right against a father who has married the child's mother.

7. Unless this Court requires Defendant, Richard D., to contribute to the support and upkeep of his minor daughter said child will experience great economic hardship for the next eighteen (18) years, which hardships she would not otherwise have to endure, and which will deprive her of equal privileges and opportunities of similarly situated father supported children.

8. Plaintiff, Linda R. S. has been and will continue to be subjected to economic coercion by the State of Texas in that she recognizes that her child cannot be raised with equal rights and opportunities such as similarly situated father supported children.

9. Because of such state enforced economic hardship, Plaintiff and others similarly situated are not permitted to freely elect between keeping and rearing their child and the alternatives of placing that child for adoption or even having its birth aborted.

10. Unless Defendant, Richard D., be required to contribute to the support of such child, Plaintiff will be required to choose between giving her child up for adoption and rearing by other parties, or subjecting the child to a life of unequal rights, unequal opportunities, and unequal support as compared to father supported children.

11. This is a proper case to be heard by a Three-Judge Court in that Plaintiff is challenging state statutes as invalid on their face under the United States Constitution, and is seeking an injunction against the discriminatory enforcement of said statutes, and is of significant public concern.

V. CAUSES OF ACTION

1. The child support provision of Article 4.02 of the Texas Family Code and Article 602 of the Texas Penal Code are unconstitutional on their face.

2. Said statutes deprive unwed pregnant women and unwed mothers of their federal constitutional rights as guaranteed in the NINTH and FOURTEENTH Amendments to the United States Constitution, to-wit:

A. Said Texas statutes, laws and customs have deprived Plaintiff of the fundamental rights of all women to freely choose whether to bear children.

B. They deprive Plaintiff of the fundamental right of all mothers to freely choose whether to keep their children.

C. Said statutes, laws and customs deny Plaintiff equal protection of the laws.

D. Said Texas statutes, laws and customs deny, without due process of law, Plaintiff's rights to have and keep her child.

3. Said Texas statutes, laws and customs deprive Plaintiff's minor daughter, and other children of unwed mothers of their Federal Constitutional rights protected by the NINTH and FOURTEENTH Amendments to the United States Constitution, to-wit:

A. They deprive said child of the equal protection of the laws.

B. They deprive said child of the fundamental right of all children to support from their natural father.

C. Said statutes deny, without due process of law said child's fundamental rights of equal opportunities and privileges of other children receiving support from their fathers.

4. Provisions of Article 4.02 of the Texas Family Code and of Article 602 of the Texas Penal Code discriminate against the Plaintiff's minor child solely because of circumstances surrounding the child's conception. Said statutes are not supported by any overriding and compelling state interest and in fact operate to the detriment of the citizens of Texas who often must ultimately bear the support of said children.

VI. RELIEF REQUESTED

1. Plaintiff prays that a Three-Judge Court be convened to hear this cause.

2. Plaintiff prays that a Declaratory Judgment be issued holding the Texas Child Support Laws unconstitutional on their face as written.

3. Plaintiff prays that a permanent mandatory injunction issue, requiring the State of Texas to cease its discriminatory application of its Child Support Laws, and that Defendant, Richard D., be required to pay a reasonable amount of money for the support of his child, that Defendants be compelled to pay costs of Court, and such further relief at law or in equity as Plaintiff may be entitled to receive.

Respectfully submitted,

McKool, McKool, Jones, Shoemaker and Turley.

(By *Windle Turley*, Attorney for Plaintiff, 2000 McKool Building, 5025 North Central Expressway, Dallas, Texas 75205—521-7500).

ORDER DESIGNATING THREE JUDGE PANEL

[Number and title omitted] (Filed December 18, 1970)

The Requesting Judge (1) above named to whom an application for relief has been presented in the above cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and District Judge (2) named above to serve with the Requesting Judge (1) as members of, and with him to constitute the said Court to hear and determine the action.

This designation and composition of the three-Judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-Judge rather than a one-Judge court. This is a matter best determined by the three-Judge Court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both. The parties will be af-

forded the opportunity to brief and argue all such questions before the three-Judge panel either preliminarily or on the trial of the merits, or otherwise, as that Court thinks appropriate. See Jackson v. Choate, 5 Cir., 1968, 404 F.2d 910, Jackson v. Department of Public Welfare of the State of Florida, S.D. Fla., 1968, 296 F.Supp. 1341; City of Gainesville, Georgia v. Southern Railway Company, N.D. Ga., 1969, 296 F.Supp. 763; Smith v. Ladner, S.D. Miss., 1966, 260 F.Supp. 918; Hargrave v. McKinney, M.D. Fla., 1969, 302 F.2d 1381; Langford v. Barlow [No. 26770], 5 Cir., 1969, 417 F.2d 628, Langford v. Barlow, W.D. Tex., 1969, 304 F.Supp. 657;

JOHN R. BROWN,
Chief Judge, Fifth Circuit.

DEFENDANT'S ANSWER

[Number and title omitted] (Filed December 22, 1970)

To Hon. Judges of said court:

Comes now the State of Texas, a Defendant in the above styled and numbered cause, represented herein by Crawford C. Martin, Attorney General of Texas, and in reply to Plaintiffs' Complaint, files this its answer and would respectfully show the Court as follows:

I.

The allegations contained in Plaintiffs' Complaint fail to state a cause of action upon which relief can be granted.

II.

A. The Defendant denies the allegations contained in Subparagraph (1) of Paragraph II, Subparagraph (2) of Paragraph II, Subparagraph (6) of Paragraph IV, Subparagraph (8) of Paragraph IV, Subparagraph (9) of Paragraph IV, Subparagraph (11) of Paragraph IV, Paragraph V, and Paragraph VI of Plaintiffs' Complaint.

B. The Defendant admits the allegations contained in Paragraph III of Plaintiffs' Complaint.

C. The Defendant does not have sufficient knowledge or information to admit or deny the allegations contained in Subparagraph (1) of Paragraph I, Subparagraph (2) of Paragraph I, Subparagraph (3) of Paragraph I, Subparagraph (4) of Paragraph I, Subparagraph (1) of Paragraph IV, Subparagraph (2) of Paragraph IV, Subparagraph (3) of Paragraph

IV, Subparagraph (4) of Paragraph IV, Subparagraph (7) of Paragraph IV, and Subparagraph (10) of Paragraph IV of Plaintiffs' Complaint and therefore the same should be taken as denied.

D. The Defendant admits the allegations contained in the last sentence of Subparagraph (5) of Paragraph I of Plaintiffs' Complaint, but the Defendant denies the remaining allegations contained in Subparagraph (5) of Paragraph I of Plaintiffs' Complaint.

E. The Defendant does not have sufficient knowledge or information to either admit or deny the allegations contained in Subparagraph (5) of Paragraph IV of Plaintiffs' Complaint, and the same shall be taken as denied.

III.

The Defendant affirmatively alleges that no provision of the Constitution of the United States, including the Ninth and Fourteenth Amendments thereto, require the State of Texas or the Legislature of the State of Texas to enact legislation to solve every social ill which may be presented. The fact that the State of Texas has not enacted legislation similar to Article 4.02 of the Texas Family Code and Article 602 of the Texas Penal Code in connection with a parent's responsibility toward illegitimate children is not a valid grounds for invalidating otherwise valid legislation—namely, Article 4.02 of the Texas Family Code and Article 602 of the Texas Penal Code.

IV.

The Defendant affirmatively alleges that the enactment of Article 4.02 of the Texas Family Code and Article 602 of the Texas Penal Code is a valid enactment by the Legislature of the State of Texas and is not in conflict with the Constitution of the State of Texas or of the United States.

Wherefore, premises considered, the Defendant, State of Texas, prays that the relief sought by the Plaintiffs be in all things denied.

Respectfully submitted.

CRAWFORD C. MARTIN,
Attorney General of Texas.
PAT BAILEY,
Assistant Attorney General.
Attorneys for defendant, the State of Texas: P.O. Box 12548. Capitol Station, Austin, Texas 78711.

STIPULATED STATEMENT OF FACT

[Number and title omitted] (Filed March 23, 1971)

1. The Plaintiffs in this case are Linda R. S., individually, and as next friend of her infant daughter, and all other unwed mothers and illegitimate children similarly situated in the State of Texas.

2. The Defendants are Richard D., and The State of Texas. All individual parties are citizens of the State of Texas.

3. For a period of several months in 1969 and 1970 Plaintiff Linda S. and Defendant Richard D. lived together but were never formally married. During this period of time Plaintiff Linda S. became pregnant by Defendant Richard D., and on October 3, 1970, the Plaintiff gave birth to a baby girl. Although Plaintiff requested the Defendant Richard D. to marry her or agree to support his child the Defendant has refused, and continues to refuse to either marry Plaintiff or support the child.

4. The Defendant Richard D. has refused to contribute any aid or support to his child either before its birth or subsequent thereto. The minor infant has continued to live with and be maintained solely by the efforts of its mother Linda S. Although the Plaintiff mother is employed full time she has very little money and cannot support the parties minor daughter in a manner equal to the opportunities and privilages of a comparably situated "father-supported" child.

5. In the year 1969 there were 19,446 illegitimate births reported in the State of Texas representing 8.8 percent of all live births reported that year. There were 3,428 illegitimate births reported in the City of Dallas representing 14.2 percent of all live births in that City the same year. In 1970, 28.6 percent of all children receiving aid for dependent children in the State of Texas were classed as illegitimate by the Texas Department of Public Welfare.

6. In the State of Texas both by statute and common law, a legitimate child is entitled to enforce payments of child support from his father. Illegitimate children in this State are specifically excluded from both statutory and common law benefits of child support payments from their father.

The above and foregoing Statement of Facts is specifically agreed to by Plaintiffs and by the State of Texas to constitute the true findings of fact herein. It is further specifically agreed by the parties hereto that this case may be submitted to the

Court for determination upon the above and foregoing stipulated facts and that a binding judgment be rendered by this Court thereon.

Stipulated and agreed this _____ of February, 1971 by:

/s/ WINDLE TURLEY,
Attorney of Record for Plaintiffs.
/s/ PAT BAILEY,
Assistant Attorney General
and Attorney of Record for the State of Texas.

AFFIDAVITS IN SUPPORT OF STIPULATED STATEMENT OF FACTS

[Number and title omitted] (Filed March 23, 1971)

1. Affidavit of Robert Gerstenberg, Texas Department of Health.
2. Affidavit of Albert Dunagan, City of Dallas Department of Health.
3. Affidavit of Plaintiff.
4. Testimony of Burton G. Hackney before Senate Interim Committee on Welfare Reform.

By WINDLE TURLEY,
Attorney of Record for Plaintiffs.

STATE OF TEXAS,
County of Travis.

My name is Robert Gerstenberg and I am an official Statistician in the Vital Statistics Office of the Texas Department of Public Health. Part of my duties entail maintaining records of births in the State of Texas. I have examined the records for the year 1969, which is the last year of completed records, and the information set forth herein is true and correct for that year.

In 1969 in the State of Texas there were 19,466 illegitimate births reported out of a total of 220,647 total live births. Illegitimate births in the State of Texas thus represented approximately 8.8 percent of the total live births.

Of the above referenced total live births in 1969, 32,466 of them were of non-white parents out of which number 9,931 were reported as non-white illegitimate births.

ROBERT GERSTENBERG,
Texas Department of Health,
Vital Statistics Department.

Before me on this the 26th day of February, 1971, personally appeared Robert Gerstenberg known to me to be the person whose name is subscribed hereto and stated to me upon his oath that the above and foregoing Statement is true and correct.

LENA C. MITCHELL,
Notary Public in and for Travis County, Texas.

STATE OF TEXAS,
County of Dallas.

My name is Albert Dunagan and I am employed by the the City of Dallas Department of Health. Part of my duties involve maintaining and keeping the records of births and deaths in the City of Dallas. I have set forth herein the records for 1969, which are the last available complete records, and they are true and correct to the best of my knowledge.

There were 3,428 illegitimate births reported in the City of Dallas (this does not include the entire County) out of 24,105 total live births reported in the year 1969. These figures represent approximately 14.22 percent rate of illegitimate births per live births. The above figures represent 1,059 illegitimate births out of 16,131 white births reported; 2,229 illegitimates out of 6,082 black births reported; and 140 illegitimates out of 1,892 Mexican-American births reported. The percentage of illegitimates of all live births ranges from 6.6 percent among whites to 36.6 percent among blacks.

ALBERT DUNAGAN,
City of Dallas,
Department of Health, Vital Statistics.

On this 8th day of March, 1971, personally appeared Albert Dunagan whose name is subscribed to the foregoing and swore upon his oath that he has full knowledge of the above statistics and that they are true and correct.

LUCILLE E. GILLESPIE,
Notary Public in and for Dallas County, Texas.

(Filed March 23, 1971)

PLAINTIFF'S AFFIDAVIT

[Number and title omitted]

STATE OF TEXAS,
County of Dallas.

My name is Linda R. S. and I am a resident of Dallas, Dallas County, Texas, and was a resident of this County and State at

the time and occurrence of all of the incidents made the basis of this lawsuit.

For a period of several months in 1969 and 1970 I lived with Richard D. although we were never formally married. During this period of time I became pregnant by Richard D. and on October 3, 1970, I gave birth to a baby girl. Although I have requested Richard D. to marry me or agree at least to support his child he has refused to do so, and continues to refuse to either marry me or provide any support for his child. Richard refused to contribute any aid to his child in the form of medical treatment and care prior to its birth, or medical and hospitalization expenses at its birth and he has been unwilling to provide any aid or support since the childs birth. The baby has lived with me continuously since her birth and has been maintained solely by my efforts. I am employed full time but I have little money with which to care for myself and my child and I certainly cannot support our daughter in a manner equal to the care, opportunities and privileges which would be afforded her if she received support from her father.

I have read the above statement of fact and it is fully true and correct.

LINDA R. SHELL.

Before me on this 9th day of March, 1971, personally appeared LINDA S. and represented to me that she had read the above and foregoing statement, and had signed a portion of her name thereto, and that all of the statements and facts set forth in said statement are fully true and correct.

_____, _____,

Notary Public in and for Dallas County, Texas.

SENATE INTERIM COMMITTEE ON WELFARE REFORM

JULY 9, 1970.

Old Supreme Court Room, Capitol Building.

[Testimony by Mr. Burton G. Hackney]

Mr. WILLIAM P. HOBBY. Is there anybody in the audience who would like to appear on this issue of garnishment? Mr. Hackney, do you have any views you would like to share with us?

Mr. HACKNEY. Mr. Chairman, I can give you some personal experience. All of my legal career is spent within 30 miles of

the New Mexico line. During these years we have had an oil field up and down the line on either side of the line. New Mexico does have the provision for the garnishment of wages. We have, through the years, used it many times where a roughneck or a driller is over in New Mexico working on a well. He is actually a citizen of Texas with a judgment against him, and we have used it. I've been accused of being an "old foggy", but I really believe that a person, a father of children, should be charged with their support. And it should be collected. I have a print out from our computer as of March of this year that of all of the children that we have on our rolls at AFDC, 13.38% of them are there because of divorce, 13.90% because of separation, 17.42% because of desertion. Among other reasons, we have 44.70% of our case loads that the fathers of these children are walking the streets of this country without supporting them and have left them to the state to support. Now if you want to add another 28.58% of them that were born out of wedlock, you arrive at about 73.28% of our roll. If we had a strong paternity law, we might be able to have 73% of these children supported by those people who have sired them.

Courts have a tremendous problem. I think those of you who are attorneys can testify to this that we get judgments for mothers in divorce cases for support of children. The father defaults and he comes back into the courts, or the mother does, in contempt proceedings. The courts have one of two alternatives; throw the man in jail or take his promise to pay up and to keep paying. Generally, he will promise to pay and the court will let him go. Within 2 or 3 months the same condition is existing. So, it's one of those things that goes round and round and round. Whether there should be some strengthening in our judicial proceedings for the granting of divorces that would put more teeth in support or just where it should lie. I don't know. I do know that it is a problem. And it, to the taxpayers of this state, is a very costly problem that we need help in solving. I think that is about all I have to say on it.

Mr. HOBBY. Commissioner, did you give an estimate of the percentage of AFDC cases that would be affected? I believe you did; did you not?

Mr. HACKNEY. This is what I am talking about, AFDC cases.

Senator JORDAN. The percentage, I missed it, that you think if we had garnishment would be . . .

Mr. HACKNEY. Well, with desertion, divorce, and separation there is 44.70% and if you add those born out of wedlock, 28.58%, you've got 73.28%.

Senator JORDAN. That is what I mean. Thank you.

PLAINTIFF'S FIRST AMENDED COMPLAINT

[Number and title omitted] (Filed March 23, 1971)

I. PARTIES

1. Plaintiff Linda R. S. is a citizen of the State of Texas, and a resident of Dallas County, Texas.

2. Plaintiff's minor daughter is a citizen of the State of Texas and resides with Plaintiff in Dallas County, Texas.

3. Plaintiff sues on behalf of herself, her minor daughter, and on behalf of all other women and minor children who have sought, are seeking, or in the future will seek to obtain support for so-called illegitimate children from said child's father. The number of members of the class is large and joinder of all members is impractical; there are questions of law and fact common to each class; the claims of Plaintiff are typical of such class; and the named Plaintiff will fairly and adequately protect the interests of the class.

4. Defendant, Richard D., is a citizen of the State of Texas and a resident of Dallas County, Texas.

5. Defendant, State of Texas, is a party hereto in that certain laws and enactments of the State of Texas infringe the Federal Constitutional rights of Plaintiff, Plaintiff's minor daughter, and others similarly situated. Notice of this suit is given to Honorable Preston Smith, Governor of the State of Texas, and to Honorable Crawford Martin, Attorney General for the State of Texas.

6. Dallas County District Attorney, Henry Wade, who is given the duty to enforce in Dallas County the provisions of the Texas Penal Code, Article 602.

7. Justice Robert Calvert, Chief Justice of the Texas Supreme Court, the highest Court in the State of Texas and which Court has the duty of interpreting and applying Civil Statute, Article 4.02 of the Texas Family Code.

8. Crawford Martin, Attorney General for the State of Texas, has been given notice of this suit and as appeared herein.

II. JURISDICTION

1. Plaintiff invokes the jurisdiction of this Court under the NINTH and FOURTEENTH Amendments to the United States Constitution; and under Title 28, United States Code, Sections 1331, 1343, 2201, 2202, 2281, and 2284; and Title 43, United States Code, Section 1983.

2. Plaintiff seeks (a) a Declaratory Judgment that Article 4.02 of the Texas Family Code, and Article 602 of the Texas Penal Code are unconstitutional on their face, and have been unconstitutionally applied so as to systematically exclude unwed mothers and children of unwed mothers from the benefits of such laws; (b) a permanent mandatory injunction to prevent the further exclusion of such class of persons from the protection of the laws of the State of Texas.

3. Although this suit is concerned with a depravation of Plaintiff's civil rights and as such is an exception to the $10,000.00 jurisdictional amount, Plaintiff would nonetheless show the Court that more than $10,000.00 is involved in depriving Plaintiffs of Defendant, Richard D.'s support.

III. STATUTES

1. Article 4.02 of the Texas Family Code provides:

> *"Each spouse has the duty to support his or her minor children.* The husband has the duty to support the wife and the wife has the duty to support the husband when he is unable to support himself. A spouse who fails to discharge the duty of support is liable to any person who provides necessaries to those to whom support is owed."

2. Article 602 of the Texas Penal Code provides:

> "Any husband who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his wife who may be in necessitous circumstances, or any parent who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not more than two years."

IV. FACTS

1. Plaintiff and Defendant, Richard D., cohabited for a period of several months in 1969 and 1970 during which time Plaintiff became pregnant by the Defendant, Richard D.

2. On October 3, 1970, Plaintiff gave birth to a girl baby, of which child Richard D. is the father.

3. Although requested by Plaintiff many times to do so, Defendant, Richard D., has refused to either marry Plaintiff or support their minor daughter.

4. Plaintiff has very little money and cannot support the parties' minor daughter in a manner equal to the opportunities and privileges of a father supported child.

5. Plaintiff's minor daughter is not entitled to receive and in all reasonable probability will not receive support from any source other than her natural parents.

6. The laws of Texas as written and as applied give the Plaintiff's child no rights of support from her father, but said laws do provide other children that right against a father who has married the child's mother.

7. Unless this Court requires Defendant, Richard D., to contribute to the support and upkeep of his minor daughter said child will experience great economic hardship for the next eighteen (18) years, which hardships she would not otherwise have to endure, and which will deprive her of equal privileges and opportunities of similarly situated father supported children.

8. Plaintiff, Linda R. S. has been and will continue to be subjected to economic coercion by the State of Texas in that she recognizes that her child cannot be raised with equal rights and opportunities such as similarly situated father supported children.

9. Because of such state enforced economic hardship, Plaintiff and others similarly situated are not permitted to freely elect between keeping and rearing their child and the alternatives of placing that child for adoption or even having its birth aborted.

10. Unless Defendant, Richard D., be required to contribute to the support of such child, Plaintiff will be required to choose between giving her child up for adoption and rearing by other parties, or subjecting the child to a life of unequal rights, unequal opportunities, and unequal support as compared to father supported children.

11. This is a proper case to be heard by a Three-Judge Court in that Plaintiff is challenging state statutes as invalid on their face under the United States Constitution, and is seeking an injunction against the discriminatory enforcement of said statutes, and is of significant public concern.

V. CAUSES OF ACTION

1. The child support provision of Article 4.02 of the Texas Family Code and Article 602 of the Texas Penal Code are unconstitutional on their face.

2. Said statutes deprive unwed pregnant women and unwed mothers of their federal constitutional rights as guaranteed in the NINTH and FOURTEENTH Amendments to the United States Constitution, to-wit:

A. Said Texas statutes, laws and customs have deprived Plaintiff of the fundamental rights of all women to freely choose whether to bear children.

B. They deprive Plaintiff of the fundamental right of all mothers to freely choose whether to keep their children.

C. Said statutes, laws and customs deny Plaintiff equal protection of the laws.

D. Said Texas statutes, laws and customs deny, without due process of law, Plaintiff's rights to have and keep her child.

3. Said Texas statutes, laws and customs deprive Plaintiff's minor daughter, and other children of unwed mothers of their Federal Constitutional rights protected by the NINTH and FOURTEENTH Amendments to the United States Constitution, to-wit:

A. They deprive said child of the equal protection of the laws.

B. They deprive said child of the fundamental right of all children to support from their natural father.

C. Said statutes deny, without due process of law said child's fundamental rights of equal opportunities and privileges of other children receiving support from their fathers.

4. Provisions of Article 4.02 of the Texas Family Code and of Article 602 of the Texas Penal Code discriminate against the Plaintiff's minor child solely because of circumstances surrounding the child's conception. Said statutes are not supported by any overriding and compelling state interest and in fact op-

erate to the detriment of the citizens of Texas who often must ultimately bear the support of said children.

VI. RELIEF REQUESTED

1. Plaintiff prays that a Three-Judge Court be convened to hear this cause.

2. Plaintiff prays that a Declaratory Judgment be issued holding the Texas Child Support Laws unconstitutional in their exclusion of children of unwed parents.

3. Plaintiff prays that a permanent mandatory injunction issue, requiring the State of Texas and its state officers to cease their discriminatory application of Child Support Laws, and that Defendant, Richard D., be required to pay a reasonable amount of money for the support of his child, that Defendants be compelled to pay costs of Court, and such further relief at law or in equity as Plaintiff may be entitled to receive.

Respectfully submitted.

McKool, McKool, Jones, Shoemaker & Turley.
/s/ By WINDLE TURLEY,
Attorney for Plaintiff.

[Certification of service omitted]

Leave granted, signed "Sarah T. Hughes."

ORIGINAL ANSWER OF DEFENDANT HENRY WADE

[Number and title omitted] (Filed April 2, 1971)

Now comes Henry Wade, Criminal District Attorney of Dallas County, Texas, one of the defendants in the above styled and numbered cause. and makes this his Original Answer herein, and would show the Court:

I

Defendant is the Criminal District Attorney of Dallas County, Texas.

II

Defendant is without knowledge or information sufficient to form a belief as to the following averments in Plaintiff's First Amended Complaint:

(a) That plaintiff is a resident of Dallas County, Texas.

(b) That plaintiff has a minor daughter, and if so, that said minor resides with plaintiff in Dallas County, Texas.

(c) That plaintiff represents a class, if any.

(d) That defendant RICHARD D. is a resident of Dallas County, Texas.

(e) That plaintiff and RICHARD D. cohabited for several months during 1969 and 1970, and that plaintiff became pregnant by RICHARD D.

(f) That RICHARD D. has refused to marry plaintiff or support their minor daughter, if any.

(g) That plaintiff is financially unable to support her minor daughter, if any.

(h) That plaintiff's minor daughter, if any, is not entitled to receive and will not receive support from any source other than her natural parents.

(i) That the said minor child, if any, will suffer economic hardship unless RICHARD D. contributes to her upkeep and support.

(j) That plaintiff is not permitted to freely elect between keeping and rearing her child, if any, and placing it for adoption.

(k) That plaintiff will be required to choose between giving the child, if any, up for adoption or subjecting the child to a life of unequal rights, opportunities and support unless RICHARD D. is required to contribute to the support of such child, if any.

III

Defendant denies that Article 4.02 of the Texas Family Code and Article 602 of the Texas Penal Code are unconstitutional for any of the reasons set forth in *Section V—Causes of Action* at pages 4 and 5 of Plaintiff's First Amended Complaint, and says that the said statutes are clearly and narrowly drawn and do not offend in any way against the provisions of the Constitution of the United States.

Wherefore, defendant Henry Wade prays that plaintiff's application for relief be in all things denied, and that defendant have and recover against plaintiff his costs in this behalf expended.

JOHN B. TOLLE,
Assistant District Attorney,
Dallas County Courthouse, Dallas, Texas 75202.

HENRY WADE,
Attorney for Defendant.

[Certification of service omitted.]

Defendants' First Amended Answer

[Number and title omitted]

(Filed April 5, 1971)

To Hon. Judges of said court:

Comes now the State of Texas, a Defendant in the above styled and numbered cause, represented herein by Crawford C. Martin, Attorney General of Texas, and in reply to Plaintiffs' Second Amended Complaint, files this its First Amended Answer and would respectfully show the Court as follows:

I.

The allegations contained in Plaintiffs' Second Amended Complaint fail to state a cause of action upon which relief can be granted.

II.

The allegations contained in Plaintiffs' Second Amended Complaint fail to allege or show grounds giving this Court jurisdiction.

III.

The allegations contained in Plaintiffs' Second Amended Complaint fail to adequately show that the amount involved in the controversy is sufficient to give the Court jurisdiction.

IV.

A. The Defendant denies the allegations contained in Subparagraph (1) of Paragraph II, Subparagraph (2) of Paragraph II, Subparagraph (3) of Paragraph II, Subparagraph (6) of Paragraph IV, Subparagraph (8) of Paragraph IV, Subparagraph (9) of Paragraph IV, Subparagraph (11) of Paragraph IV, Paragraph V, and Paragraph VI of Plaintiffs' Second Amended Complaint.

B. The Defendant admits the allegations contained in Paragraph III of Plaintiffs' Second Amended Complaint.

C. The Defendant does not have sufficient knowledge or information to admit or deny the allegations contained in Subparagraph (1) of Paragraph I, Subparagraph (2) of Paragraph I, Subparagraph (3) of Paragraph I, Subparagraph (4) of Paragraph I, Subparagraph (1) of Paragraph IV, Subparagraph (2) of Paragraph IV, Subparagraph (3) of Paragraph IV, Subparagraph (4) of Paragraph IV, Subparagraph (7) of Paragraph IV, and Subparagraph (10) of Paragraph IV of

Plaintiffs' Second Amended Complaint and therefore the same should be taken as denied.

D. The Defendant admits the allegations contained in the last sentence of Subparagraph (5) of Paragraph 1 of Plaintiffs' Complaint, but the Defendant denies the remaining allegations contained in Subparagraph (5) of Paragraph 1 of Plaintiffs' Second Amended Complaint.

E. The Defendant does not have sufficient knowledge or information to either admit or deny the allegations contained in Subparagraph (5) of Paragraph IV of Plaintiffs' Second Amended Complaint, and the same shall be taken as denied.

F. The Defendant admits the allegations contained in Subparagraph (6) of Paragraph I of Plaintiffs' Second Amended Complaint that Henry Wade is the Dallas County District Attorney, but the Defendant does not have sufficient knowledge or information to either admit or deny the remaining allegations contained therein.

G. The Defendant admits the allegations contained in Subparagraph (7) of Paragraph I of Plaintiffs' Second Amended Complaint that Robert Calvert is Chief Justice of the Texas Supreme Court, the highest court of civil jurisdiction in the State of Texas, but the Defendant does not have sufficient knowledge or information to either admit or deny the remaining allegations contained therein.

H. The Defendant admits the allegations contained in Subparagraph (8) of Paragraph I of Plaintiffs' Second Amended Complaint that Crawford Martin is Attorney General for the State of Texas and has been given notice of this suit, and Defendant further admits that Crawford Martin has made an appearance herein to the extent of representing the Defendant, State of Texas, but the Defendant denies the remaining allegations contained therein.

V.

The Defendant affirmatively alleges that no provision of the Constitution of the United States, including the Ninth and Fourteenth Amendments thereto, require the State of Texas or the Legislature of the State of Texas to enact legislation to solve every social ill which may be presented. The fact that the State of Texas has not enacted legislation similar to Article 4.02 of the Texas Family Code and Article 602 of the Texas Penal Code in connection with a parent's responsibility toward illegitimate children is not a valid grounds for invalidating otherwise valid

legislation—namely, Article 4.02 of the Texas Family Code and Article 602 of the Texas Penal Code.

VI.

The Defendant affirmatively alleges that the enactment of Article 4.02 of the Texas Family Code and Article 602 of the Texas Penal Code is a valid enactment by the Legislature of the State of Texas and is not in conflict with the Constitution of the State of Texas or of the United States.

VII.

The Defendant affirmatively alleges that the Plaintiffs have failed to allege in what manner or way the District Attorney of Dallas County, Texas, the Chief Justice of the Texas Supreme Court, the Attorney General of the State of Texas, or the State of Texas have the duty to enforce the statutory provisions in question, or have threatened to so enforce such statutory provisions against or to the detriment of the Plaintiffs.

Wherefore, premises considered, The Defendant, State of Texas, prays that the relief sought by the Plaintiffs be in all things denied.

Respectfully submitted.

CRAWFORD C. MARTIN,
Attorney General of Texas.
PAT BAILEY,
Assistant Attorney General.
P.O. Box 12548, Capitol Station,
Austin, Texas 78711.
Attorneys for Defendant, the State of Texas.

[Certificate of service omitted.]

PLAINTIFF'S MOTION TO FILE AMENDED COMPLAINT

[Number and title omitted] (Filed April 6, 1971)

To Hon. Judge of said court:

Comes now Linda R. S., a Plaintiff in the above styled and numbered cause, and files this her Motion for leave to file her Second Amended Complaint and for cause would show the Court the following:

I.

Plaintiff's First Amended Complaint made Henry Wade, Dallas County District Attorney and Justice Robert Calvert, Chief Justice of the Texas Supreme Court, additional parties herein but did not specify that they were Defendant parties which was in fact Plaintiff's intent. Plaintiff's Second Amended Complaint differs from her First Amended Complaint only in that Plaintiff has added language to Paragraph 6, 7 and 8 on Pages 1 and 2 to make clear her intent that said parties be treated as Defendants herein.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that leave be granted to file this her Second Amended Complaint.

Respectfully submitted.

McKool, McKool, Jones, Shoemaker & Turley.
BY WINDLE TURLEY,
Attorney for Plaintiff.

ORDER UPON PLAINTIFF'S MOTION TO FILE AMENDED COMPLAINT

Leave is hereby granted this ——— day of April, 1971, to Plaintiff to file her Second Amended Complaint.

———— ————,
Judge.

(Original signed by Judge Sara T. Hughes on April 6, 1971).

PLAINTIFF'S SECOND AMENDED COMPLAINT

[Number and title omitted] (Filed April 6, 1971)

I. PARTIES

1. Plaintiff, Linda R. S. is a citizen of the State of Texas, and a resident of Dallas County, Texas.

2. Plaintiff's minor daughter is a citizen of the State of Texas and resides with Plaintiff in Dallas County, Texas.

3. Plaintiff sues on behalf of herself, her minor daughter, and on behalf of all other women and minor children who have sought, are seeking, or in the future will seek to obtain support for so-called illegitimate children from said child's father. The number of members of the class is large and joinder of all members is impractical; there are questions of law and fact common to each class; the claims of Plaintiff are typical of such class;

and the named Plaintiff will fairly and adequately protect the interests of the class.

4. Defendant, Richard D., is a citizen of the State of Texas and a resident of Dallas County, Texas.

5. Defendant, State of Texas, is a party hereto in that certain laws and enactments of the State of Texas infringe the Federal Constitutional rights of Plaintiff, Plaintiff's minor daughter, and others similarly situated. Notice of this suit is given to Honorable Preston Smith, Governor of the State of Texas, and to Honorable Crawford Martin, Attorney General for the State of Texas.

6. Dallas County District Attorney, Henry Wade, who is given the duty to enforce in Dallas County the provisions of the Texas Penal Code, Article 602, is made a Defendant herein.

7. Justice Robert Calvert, Chief Justice of the Texas Supreme Court, the highest Court in the State of Texas and which Court has the duty of interpreting and applying Civil Statute, Article 4.02 of the Texas Family Code, is made a Defendant herein.

8. Crawford Martin, Attorney General for the State of Texas, has been given notice of this suit and appeared herein, and is made a Defendant herein.

II. JURISDICTION

1. Plaintiff invokes the jurisdiction of this Court under the NINTH and FOURTEENTH Amendments to the United States Constitution; and under Title 28, United States Code, Sections 1331, 1343, 2201, 2202, 2281, and 2284; and Title 43, United States Code, Section 1983.

2. Plaintiff seeks (a) a Declaratory Judgment that Article 4.02 of the Texas Family Code, and Article 602 of the Texas Penal Code are unconstitutional on their face, and have been unconstitutionally applied so as to systematically exclude unwed mothers and children of unwed mothers from the benefits of such laws; (b) a permanent mandatory injunction to prevent the further exclusion of such class of persons from the protection of the laws of the State of Texas.

3. Although this suit is concerned with a deprivation of Plaintiff's civil rights and as such is an exception to the $10,000.00 jurisdictional amount, Plaintiff would nonetheless show the Court that more than $10,000.00 is involved in depriving Plaintiffs of Defendant, Richard D.'s support.

III. STATUTES

1. Article 4.02 of the Texas Family Code provides:

> *"Each spouse has the duty to support his or her minor children.* The husband has the duty to support the wife and the wife has the duty to support the husband when he is unable to support himself. A spouse who fails to discharge the duty of support is liable to any person who provides necessaries to those to whom support is owed."

2. Article 602 of the Texas Penal Code provides:

> "Any husband who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his wife who may be in necessitous circumstances, or any parent who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not more than two years."

IV. FACTS

1. Plaintiff and Defendant, Richard D., cohabited for a period of several months in 1969 and 1970 during which time Plaintiff became pregnant by the Defendant, Richard D.

2. On October 3, 1970, Plaintiff gave birth to a girl baby, of which child Richard D. is the father.

3. Although requested by Plaintiff many times to do so, Defendant, Richard D., has refused to either marry Plaintiff or support their minor daughter.

4. Plaintiff has very little money and cannot support the parties' minor daughter in a manner equal to the opportunities and privileges of a father supported child.

5. Plaintiff's minor daughter is not entitled to receive and in all reasonable probability will not receive support from any source other than her natural parents.

6. The laws of Texas as written and as applied give the Plaintiff's child no rights of support from her father, but said laws do provide other children that right against a father who has married the child's mother.

7. Unless this Court requires Defendant, Richard D., to contribute to the support and upkeep of his minor daughter said

child will experience great economic hardship for the next eighteen (18) years, which hardships she would not otherwise have to endure, and which will deprive her of equal privileges and opportunities of similarly situated father supported children.

8. Plaintiff, Linda R. S. has been and will continue to be subjected to economic coercion by the State of Texas in that she recognizes that her child cannot be raised with equal rights and opportunities such as similarly situated father supported children.

9. Because of such state enforced economic hardship, Plaintiff and others similarly situated are not permitted to freely elect between keeping and rearing their child and the alternatives of placing that child for adoption or even having its birth aborted.

10. Unless Defendant, Richard D., be required to contribute to the support of such child, Plaintiff will be required to choose between giving her child up for adoption and rearing by other parties, or subjecting the child to a life of unequal rights, unequal opportunities, and unequal support as compared to father supported children.

11. This is a proper case to be heard by a Three-Judge Court in that Plaintiff is challenging state statutes as invalid on their face under the United States Constitution, and is seeking an injunction against the discriminatory enforcement of said statutes, and is of significant public concern.

V. CAUSES OF ACTION

1. The child support provision of Article 4.02 of the Texas Family Code and Article 602 of the Texas Penal Code are unconstitutional on their face.

2. Said statutes deprive unwed pregnant women and unwed mothers of their federal constitutional rights as guaranteed in the NINTH and FOURTEENTH Amendments to the United States Constitution, to-wit:

A. Said Texas statutes, laws and customs have deprived Plaintiff of the fundamental rights of all women to freely choose whether to bear children.

B. They deprive Plaintiff of the fundamental right of all mothers to freely choose whether to keep their children.

C. Said statutes, laws and customs deny Plaintiff equal protection of the laws.

D. Said Texas statutes, laws and customs deny, without due process of law, Plaintiff's rights to have and keep her child.

3. Said Texas statutes, laws and customs deprive Plaintiff's minor daughter, and other children of unwed mothers of their Federal Constitutional rights protected by the NINTH and FOURTEENTH Amendments to the United States Constitution, to-wit:

A. They deprive said child of the equal protection of the laws.

B. They deprive said child of the fundamental right of all children to support from their natural father.

C. Said statutes deny, without due process of law said child's fundamental rights of equal opportunities and privileges of other children receiving support from their fathers.

4. Provisions of Article 4.02 of the Texas Family Code and of Article 602 of the Texas Penal Code discriminate against the Plaintiff's minor child solely because of circumstances surrounding the child's conception. Said statutes are not supported by any overriding and compelling state interest and in fact operate to the detriment of the citizens of Texas who often must ultimately bear the support of said children.

VI. RELIEF REQUESTED

1. Plaintiff prays that a Three-Judge Court be convened to hear this cause.

2. Plaintiff prays that a Declaratory Judgment be issued holding the Texas Child Support Laws unconstitutional in their exclusion of children of unwed parents.

3. Plaintiff prays that a permanent mandatory injunction issue, requiring the State of Texas and its state officers to cease their discriminatory application of Child Support Laws, and that Defendant, Richard D., be required to pay a reasonable amount of money for the support of his child, that Defendants be compelled to pay costs of Court, and such further relief at law or in equity as Plaintiff may be entitled to receive.

Respectfully submitted.

McKool, McKool, Jones, Shoemaker and Turley,
By WINDLE TURLEY,
Attorney for Plaintiff.

[Certificate of service omitted.]

[2] INDEX OF PROCEEDINGS

[Number, title and appearances omitted from this record of the Three Judge Court proceedings heard on April 16, 1971]

[3] PROCEEDINGS

Dallas, Texas, April 16, 1971.

The MARSHAL. Hear ye, hear ye, hear ye, the Honorable Homer Thornberry, the Honorable Sarah T. Hughes, and the Honorable William Robert Hill presiding, holding a special session of the Dallas Division is opened according to law and pursuant to adjournment.

Let us pray. Almighty God, earnestly and humbly do we pray that Thou wilt keep these United States and this Honorable Court in Thy holy protection. Amen. Be seated, please.

Judge THORNBERRY. I call CA-3-4336-B, Linda R. S., et al versus Richard D. and the State of Texas, and I ask Counsel please to announce for the record and state how much time you think will be required.

Mr. TURLEY. Plaintiff is ready, Your Honor, and I believe if I could have about 20 minutes to make an opening statement and 10 minutes for rebuttal, if that's satisfactory with the Court, that would be sufficient time.

Judge THORNBERRY. Maybe we won't need that long. I'll say 15 minutes.

Mr. TURLEY. I'll try not to take that much time, Your Honor.

Judge HUGHES. Will you state your name, please.

[4] Mr. TURLEY. Windle Turley for the Plaintiff.

Mr. BAILEY. Pat Bailey for the State of Texas. This time will be ample—20 minutes, Your Honor, or less.

Mr. TOLLE. I'm John Tolle for the Defendant, Henry Wade, and I will defer to the State as far as the time.

Judge THORNBERRY. All right.

All right, Mr. Turley.

Mr. TURLEY. Thank you, Your Honor. May it please the Court——

Judge THORNBERRY. If you will start out, please, and tell us exactly what you are asking this Court to do.

Mr. TURLEY. Your Honor, we are asking this Court to grant a mandatory injunction against the State of Texas to forbid them from continuing to exclude children of unwed mothers from the benefits and support provisions of the Texas Child Support laws.

There are two specific statutes in question, Your Honor. One is Article 602 of the Texas Penal Code, which provides for a misdemeanor in the event of the failure of a father to support his child. The other statute in question is Article 4.02 of the Texas Family Code, which provides that a spouse will support his child.

Judge THORNBERRY. Are you attacking the [5] constitutionality of these statutes?

Mr. TURLEY. Your Honor, we are attacking them only in the context that they exclude certain individuals from their provisions.

Judge THORNBERRY. Can we grant any kind of injunctive relief when you're not attacking the constitutionality of these statutes?

Mr. TURLEY. I believe you can, Your Honor. We ask that the Court simply instruct and restrain the public officials of the State of Texas from continuing to refuse to permit illegitimate children from the benefits of these statutes. We feel that it's not necessary that the Court go so far as to actually strike down the entire statute as unconstitutional. We merely believe they are unconstitutional in the way that they are being applied so as to systematically exclude certain individuals of this State from their benefits.

Judge HUGHES. Why is 402 involved at all—because we don't have a spouse here?

Mr. TURLEY. That's exactly the point, Your Honor. On its face it provides benefits to the children of married individuals. It provides that if a father refuses to support that child, then the child can have a cause of action brought in court. No such provision is made any place in the State of Texas for [6] an illegitimate child, and we contend that this kind of systematic exclusion constitutes a denial of that child's equal protection of the law.

Judge Hughes. You're really asking us to write a new statute, because 402 simply does not apply to the fathers of illegitimate children.

Mr. Tuller. That's true, Your Honor, and as I said—I would hope the Court would be willing to simply say that the State of Texas should cease from excluding this group—illegitimate children—from the benefits of the laws which have been enacted by this State. If, however, Your Honor, because of the magnitude of the problem—the fact that some 20,000 illegitimate children are being born in this state every year; because of the seriousness of the Civil Rights involved, I would be willing to ask the Court to go ahead and declare the entire statute unconstitutional and to be remedied by the Legislature.

I think the Court has the facts in the case in mind here, Your Honor, they simply are that the Plaintiff brings this action on behalf of herself and her minor child and on behalf of all other similarly situated. She became pregnant and gave birth to a child when she was not married; the father refused to support the child and refused to marry her; he has been made a [7] party to this action but has not appeared or answered herein.

The issue then as we have stated is whether it is constitutional under the constitutional provisions for the State of Texas to exclude this illegitimate child from the protection and benefits of the Texas Child Support laws, while they go ahead and include and provide these same benefits to a legitimate child. We believe, Your Honor, that the exclusion is unconstitutional on the basis of two parts of the Constitution, both as to the mother and as to the child.

First, under the Fourteenth Amendment, the child's rights as well as the mother's rights are violated in that they are both denied equal protection of the law and they are both denied due process of law.

Under the Ninth Amendment we feel that they are both being denied basic fundamental rights which accrue to them particularly with respect to the mother's right of freedom of choice, and that a child being—as we will show the Court—condemned to a place of almost corruption of the blood where he is suffering from something that he had no control over and being inflicted with this kind of punishment is something that he had absolutely nothing to do with.

As to the first point, Your Honor, I would [8] like to just underscore momentarily the magnitude and the seriousness of the problem that we're facing. Nationally, the 300,000 illegitimate children are reported each year, at a rate that will reach something like 400,000 in 1980—one in 7 in 1969 live births in this nation were illegitimate children. In Dallas alone some 3,428 illegitimate births were reported last year. This represents almost 15% of the live birth population in this City. In the State of Texas it's something in excess of 19,000 in 1969 representing almost 9% of the live births in the State. This is a problem that is compounding itself by tremendous leaps each year. Thus the magnitude of the problem involved in sheer numbers as well as the magnitude of the Civil Rights involved, we believe, compel this Court or should compel this Court to examine the constitutional violations that we have observed.

Judge HUGHES. Do you think that this is a 3-Judge court case? You're not asking for the statute to be declared unconstitutional. You are just asking for us to interpret the statute so that it will include illegitimate children, and the statute with regard to 3-Judge court cases says that it's only when you are asking for the statute to be declared unconstitutional.

Mr. TUBLEY. That's true, Your Honor, or [9] seeking to prevent it from being unconstitutionally applied and that's what we're trying to do here.

Judge HUGHES. That isn't what it says.

Judge THORNBERRY. It says "an interlocutory or permanent injunction restraining enforcement, operation, or execution of any State statute by restraining the action of any officers of such State in the enforcement or execution of such statute or of an Order made by an Administrative Board or Commission acting under State statute shall not be granted by any District Court or Judge hereof upon the grounds of the unconstitutionality of such statute unless the application therefor is heard and determined by a District Court of three Judges under Section 2284 of this Act."

Mr. TUBLEY. Your Honor, we feel we come within those specific words and the provisions of that statute and we are asking this Court to compel the State officials to stop refusing to permit illegitimate children from having the same rights that are granted under the Texas Child Support provisions to legitimate children. This is what we define as a mandatory

injunction rather than a straight injunction whereby we are asking that they be restrained from doing an active act; we are asking at this time, Your Honor, that the State officials be restrained from their continued [10] passive refusal to permit the illegitimate child to participate in these benefits.

Judge THORNBERRY. I don't want to take up all your time with questions, but isn't the situation changed a little bit by the fact that Courts have interpreted the statute—the State Courts?

Mr. TURLEY. The statute in question?

Judge THORNBERRY. Yes.

Mr. TURLEY. No, I don't believe so, Your Honor. I don't believe there's any dispute between the Plaintiff and the State with respect to the provisions of the State statute. They acknowledge that there is no right in the State of Texas for an illegitimate to have child support provisions enforced under the law.

Judge THORNBERRY. Hasn't some court of the State of Texas interpreted it to say that it does not include illegitimate children?

Mr. TURLEY. Yes, they have, Your Honor. In 1966 the Texas Supreme Court—Infants Home versus——

Judge THORNBERRY. Doesn't that present some complication here that this Court is going to say to the highest court of the State, "You've interpreted this statute wrong"?

Mr. TURLEY. Well, Your Honor, no—I don't see that there is any complication. I think that's it [11] exactly—that they have interpreted it wrong. It has been the law in this State for many, many years—it's undisputed that that is the law. We just simply contend it's unconstitutional in the way it's being applied, Your Honor, and we ask this Court to grant that kind of direct relief.

If I could just address myself a moment here to the unequal protection provision of the problem before us. Justice Douglas in *Levy* versus *Louisiana* in a recent landmark decision said in particular language pertinent to our case and as they did in that case, "We start from the premises that the illegitimate child is not a non-person. They are humans, live, and have their being. They are clearly persons within the meaning of the Fourteenth Amendment. Having then brought them within the confines of the Fourteenth Amendment and the protection that that Amendment affords, we should then proceed to apply the

equal protection test normally set down by the Supreme Court of this nation, and that is, first, is there discrimination?"

They've got a question that there is in this case, and that point is not disputed by the State of Texas. A legitimate child has a right to support, an illegitimate child does not. That on its face is the discrimination involved.

The second part of the test is whether there is a reasonable basis or any justification to permit that kind of continued discrimination, and if there is such a reasonable basis, is the way that the discrimination is applied overly broad so as to deprive an individual of his liberties unnecessarily.

Judge HUGHES. That isn't the test that is applied in Labine. The test that's applied in Labine is insurmountable barrier.

Mr. TURLEY. Yes, Your Honor.

Judge HUGHES. How are you going to distinguish this case from Labine?

Mr. TURLEY. The Labine case as decided by the Supreme Court a couple of weeks ago, Your Honor, is distinguishable, I think quite clearly from this case, in that in the Labine situation the Court was there dealing with a situation where a Louisiana father had just failed to follow the prescribed procedure in Louisiana for leaving his property to his children. The children then complained that they were discriminated against because the State did not permit them to recover the same as the legitimate child, and in that decision——

Judge HUGHES. There was just one child that was illegitimate.

[13] Mr. TURLEY. That's true, but the man had acknowledged the child, and Louisiana has a very strange procedure, as the Court probably knows, where they have actually three classifications of children—legitimate, natural, and illegitimate, the natural being the category that had been acknowledged by the father. However, he failed to leave a Will, and the Court, Your Honor, particularly Judge Harlan, confirmed an opinion in that case and distinguishes it from the Levy case and from the situation before this Court wherein he says that they are dealing there not with this basic insurmountable confrontation that the illegitimate had in Levy, but they're dealing instead with simply a failure on the part of the intestate to leave his property in the manner prescribed by the State of Louisiana.

As the Court pointed out in its majority opinion there, Your Honor, in Levy and in this situation—the case before this Court—we are dealing with a right that has been created by the State of Texas and in Levy by the State of Louisiana—a right granted to the illegitimate but a right which excluded in Levy and excludes still in Texas the illegitimate. This is distinguishable from the Labine decision in that there you are dealing not with a right granted to the illegitimate, but rather to the decedent, and simply prescribed that he [14] could, if he desired, leave his property to the illegitimate if he followed certain steps, which he didn't do.

Judge THORNBERRY. Is there any problem here that Richard D. has not acknowledged that this child is his?

Mr. TURLEY. I don't see any problem, Your Honor. We had him served and asked that he come and appear before the Court and he did not.

Judge HUGHES. You mean you don't have any stipulation that he has acknowledged the child as his?

Mr. TURLEY. The mother has a sworn affidavit here on file, Judge, for the Court's use.

Judge THORNBERRY. You mean we can find as a fact as against Richard D. and this is his illegitimate child?

Mr. TURLEY. He has defaulted, Your Honor. I don't know what else we could do to get him before the Court. I don't think the Court necessarily has to go that far at this point in considering merely whether the child has a cause of action. I don't think we have to get into the fact issue, but I see no reason why that kind of Judgment could not be entered.

Judge THORNBERRY. Pardon me—if some of you'all met somewhere else and stipulated me as the [15] illegitimate's father and subjected me to State prosecution for adultery or something——

Mr. TURLEY. I'm sorry, Your Honor, I didn't hear the question?

Judge THORNBERRY. Go ahead.

Mr. TURLEY. If I could, Your Honor, having then outlined the test to be applied in an equal protection situation, when then proceed to then weigh the rationale of the State's justification for distinguishing the illegitimate out of the class of children and see in connection with that what consequences actually come to bear and what is the nature of the Civil Right of which we contend the illegitimate is being deprived, and I think it's

well-settled by the Supreme Court in *Skinner* versus *Oklahoma*, and in *Griswell* versus *Connecticut* and by the local Courts in *Roe* versus *Wade*, and acknowledged in *Jefferson* versus *Hackney* that in these family matters and in matters involving children we are dealing with some very basic Civil liberties. If that be true, then, what are the consequences involved?

Very briefly—they are both economic and they are socially stigmatic. *Brown* versus the *Board of Education* in 1954 took notice, Your Honor, of the fact that great psychological detriment was being brought to bear upon children who were being discrimi-[16]nated against racially. We contend that this Court can also take notice of the fact that great psychological detriment is being brought to bear upon illegitimate children in the State of Texas. As one psychologist has said, "To be fatherless is hard enough, but to be fatherless with a stigma of illegitimate birth is a psychic catastrophe", and I submit to the Court that that's no exaggeration of the kind of serious problem with which we are confronted.

For example, illegitimate children in one study indicated that naturally they had no father figure, but more surprisingly in more than half the instances they had changed their mother figure more than one time during their rearing.

In addition to that, the studies have indicated that they do substantially worse in school, the only thing they're ahead in is absenteeism. As they grow older and begin to internalize and realize the social problem that they're confronted with, they get progressively worse in all of their academic studies. They have a higher rate of infant mortality at their birth, of juvenile delinquency, and of eroticism.

Finally, it's the economic and minority groups in our communities, Your Honor, that the last able to cope with this kind of a non-support problem, upon whom the [17] burden ultimately most heavily falls, and I might add, not because of this particular economic or minority group—that it participates in sex outside of marriage more often than the other groups in our community, but because of the higher incidences of abortions—something like 83% for white college women compared to 25% for black highschool women; the higher rate of adoption—70% for whites and 4% illegitimates among blacks; and the higher rate of post-pregnancy marriages among whites than blacks—all of these figures ultimately

bring to bear the problem of non-support hardest upon that segment of our community which can least assimilate.

Judge HILL. Mr. Turley, I'm sort of in sympathy with your statistics and your philosophical argument, but I'm concerned about how to get to the problem and I think the Court is too.

Didn't Levy go up through the State Court?

Mr. TURLEY. Yes, it did, Your Honor.

Judge HILL. Why can't you go up through the State Court?

Mr. TURLEY. Your Honor, that is a possibility, and we could, but the problems of just the time and the expense involved—we think that this is the kind of situation that the 3-Judge declaratory action [18] was designed to meet. We think it's a serious problem; the magnitude is growing daily; Texas is one of only two States in this Union that now fails to provide some kind of support—statutory support provisions for illegitimate children, Idaho being the other one.

We could, Your Honor, go that route. We thought this would be more expeditious and in better interest of both the Courts and the litigants.

Finally, to summarize, a summary of probable facts surrounding an illegitimate today in the City of Dallas would reveal that he is 87% of the time black; more often than not in lower income levels; that he comprises by far the largest segment of children receiving Aid to Dependent Children——

Judge THORNBERRY. Mr. Turley, those are things that we recognize. What we are concerned about is what we can do.

I want to be sure now that I understand you. You are saying that you don't want just a Declaratory Judgment, you want some kind of injunctive relief?

Mr. TURLEY. To compel the State officials to permit this mother on behalf of her child to file an action to have the same rights and benefits as a legitimate child in this State. We feel it's just as wrong to take a kind of passive position and discrimi- [19] nate against a person as it is to take an active, affirmative position that has that same kind of detrimental effect.

Judge HUGHES. You are not asking this Court to require Richard D. to pay a reasonable amount for child support?

Mr. TURLEY. We have, Your Honor, but——

Judge HUGHES. Do you think that that ought to go to the State Court?

Mr. TURLEY. I think more expeditiously perhaps in the interest of the Court's time. We would be quite happy to have

that sent to the Domestic Relations Court of this County for determination at the time.

With respect to the problem, Your Honor, *Levy* versus *Louisiana* was confronted with a similar situation wherein the Court finally—just simply held that for the State to exclude the illegitimate from the Wrongful Death Act in that State was an invidious discrimination, and I think that's all that this Court needs to do.

Judge THORNBERRY, All right.

Mr. BAILEY. May it please the Court, I think we need to create a little bit of history in this case because I think it brings to light a few things that I believe should be brought to light. [20] The initial claim in this case was filed against solely the State of Texas asking to hold these particular provisions of the Penal Code and the Family Code as unconstitutional, and I believe in an Amended Pleading it says that the Plaintiffs and their class are asking for these statutes to be declared unconstitutional. They wish also certain injunctive relief.

After the filing of our trial Brief raising quite a few questions as to the jurisdiction of this Court, the Plaintiffs amended their Complaint to bring in certain other parties; namely, the District Attorney, Dallas County, the Chief Justice of the Texas Supreme Court, and the Attorney General of the State of Texas.

I would at the conclusion of this like to move to dismiss the Chief Justice of the Texas Supreme Court——

Judge THORNBERRY. We grant that right now.

Mr. BAILEY. They have not been served, I don't believe, as yet.

Also, in the Amended Pleading a jurisdictional amount of $10,000 was pled, which was not pled in the original. There has been no tender of proof, nor did we stipulate as to any jurisdictional amount being present. In addition, I think there would also be some question of being able to prove this—it's just what the [21] Plaintiff or anyone of them might get, and I don't believe they could aggregate all of their claims.

I think the problem of the Court as presented here is that we just have the State of Texas and the District Attorney of Dallas County being brought into this case at the present time. I think this raises a question that if the Court granted injunctive relief as prayed for by the Plaintiffs, just how would they go about this type of relief? Certainly they could enjoin Mr.

Henry Wade, but how would they enforce this type of injunction against the other District Attorneys around the rest of the State here? They are not parties to this particular suit. If the District Attorney at, say, Austin should decide to proceed under Article 602 of the Penal Code, he is not a party to this suit; the Court could not really enjoin him.

The State of Texas, if the laws keep being enforced this way—who would this Court be holding in contempt? I think this is the problem we've got here—the need for these State officers—if someone ignored in their initial pleadings, and I think what it really boils down to is that they are really asking this Court not to go out and enjoin the Chief Justice of the Texas Supreme Court or the Attorney General or Mr. Henry Wade, but to render an advisory opinion that these statutes [22] are unconstitutional.

Judge HUGHES. Mr. Bailey, with regard to the Civil statute, that simply applies to married people. They are really asking us to write another statute.

Mr. BAILEY. Yes, I think they are.

Judge HUGHES. They are not asking for an interpretation of that statute, but they are asking, as I see it, for us to write a statute which would apply to fathers of illegitimate children.

Mr. BAILEY. I think, Your Honor, what they are really doing—I agree with this—I think what they're really doing is one of two things. They are saying—either you tell the District Attorneys to prosecute the fathers of illegitimate children under 602 or don't prosecute anyone. This is in effect what they are saying, and they're also saying to have this Court make Article 4.02 applicable to illegitimate children or to no one. This is the only alternative they have really given the Court here, short of the Court going in here and trying to enter some type of Order telling the District Attorney when and when he could not file a criminal complaint, whether under 602 or when the District Judges around the State would or would not enforce Article 4.02 of the Family Code, and I think this is the tremendous problem that the Plaintiffs have more or less [23] dumped into this Court's lap and just said, "You come up with some sort of answer here."

To me this very clearly shows two things. It shows the really advisory nature of the relief being sought by the Plaintiff, or two, they are asking this Court to really get into the legislation of a statute that will take care of these illegitimate children.

Let's look at another thing. We've got to have a controversy in a lawsuit here. I think that in the Opinions that I have cited in by Brief, this is one of the elements—that the Federal Courts do not have jurisdiction and should not give merely advisory opinions.

Let's look at the parties that we've got here—the District Attorney. Who is Mr. Henry Wade at this moment threatening to prosecute under 602 of these class of Plaintiffs? No one. They are not being in any way threatened by his saying, "I'm going to prosecute the Plaintiffs." So where is the controversy between this class of Plaintiffs and the District Attorney? He is not threatening to prosecute any of the Plaintiffs. He might conceivably a father, but certainly none of these Plaintiffs, so there's no controversy between them and Mr. Wade.

The Chief Justice of the Texas Supreme Court [24] and the Attorney General—I think neither one of them has responsibility, and I believe the Court has said that they would sustain my Motion with respect to them.

Judge THORNBERRY. Your Motion was as to the Chief Justice, it wasn't as to the Attorney General also.

Mr. BAILEY. Well, in this connection, may it please the Court, we have not been served—granted I have been in court representing the State of Texas.

Judge THORNBERRY. Well, what I wanted to make clear is—our Order of Dismissal is confined to the Chief Justice.

Mr. BAILEY. All right, Sir.

We feel that there is no controversy between the Attorney General of the State of Texas and any of the particular Plaintiffs or their class. First, the Attorney General has no authority to file actions under Article 602, nor does he have any responsibility or duty to file under that or under Article 4.02 of the Family Code. We say there's no controversy, so we come back to this thing—it's an advisory opinion that they're really asking for.

Let's go back and look at the points which I think are important here as to the jurisdiction. One—as the Court is aware—we've cited authority that the jurisdictional requirements of 3-Judge Courts are very [25] strictly construed. They've got to be against an officer of the State and not just the State of Texas. This is not sufficient. I think Counsel is aware of this and is the reason we got the Amendment bringing in certain parties, but the Court decision which I cited in my Brief is that this

officer must be more than a nominal party, and we say that's all the officers in this case are. They are nominal parties to give us a State official. This is, I think, amply borne out by the fact that until our Brief was filed some two weeks ago, they weren't even considered important enough to be made a party to this case. They are nominal.

Consequently, unless you have this, I don't believe this Court has jurisdiction under Section 2281 that they are alleging as grounds.

Let's look at 28 USC 1331 under which they also allege——

Judge HUGHES. What do you think about the fact that this says that "unless the application therefore is heard and determined upon the ground of unconstitutionality of the statute"—I haven't seen yet how they are asking for the statute to be declared unconstitutional?

Mr. BAILEY. Well, Your Honor, I would ask the Court to look at Paragraph 5——

[26] Judge HUGHES. Well, they ask for it, but then when he gets up and states something and states his position, he simply says that he wants us to interpret the statute to include illegitimate children. He has asked for it in his Complaint, but that's really not what he's asking for. He's really asking us to broaden the statute so that it will include illegitimate as well as legitimate children, and that's what gives me concern—that it isn't a case that is provided for under 2281?

Mr. BAILEY. I agree with this. If Counsel is withdrawing his pleadings as to the unconstitutionality, I think he has a question then of a 3-Judge court being proper. Of course, he's also got the hurdle here—if one is not proper—if a 3-Judge Court is not proper here—it would have to go back then to a 1-Judge Court, and then we come to the question of enjoining a State official, which probably only a 3-Judge Court can do. So, I think this is the dilemna he's faced with in this thing and I think probably he's in the wrong forum, when this could more properly come up in the State Court in a particular case.

But the next point—this Section 1331, he's pled jurisdictional amounts which we have denied. There's been no proof tendered or any stipulations asked [27] of us, so under 1331, even though he may have pled a Federal question, he's got to show a jurisdictional amount unless he comes within some exception, and he hasn't pled one here in this particular case. He's pled the declaratory judgment statute, but it doesn't—standing by itself—confer jurisdiction on this Court. I think

this is really what he has asked for here is a declaratory judgment or an advisory opinion, but he's got to base this on some other grounds of jurisdiction.

Now, he's pled 1343, which is your Civil Rights statute. This again doesn't, standing alone, confer jurisdiction upon this Court, and he's gone to 1983, and under this then he's got to have the State official acting under color of State law, and we've just gone this great big vicious cycle again back here, and I think what he's done—he's got a question that he'd like to get before a Court, but I don't think he's before the right one here today.

Judge HILL. Which is the right court?

Mr. BAILEY. I think, Your Honor, the proper way would be to come through the State Court, if he's going mainly after 602—would be in some particular case where they filed on a person under 602, and for this particular Defendant to say "You can't enforce that on me, it's unconstitutional because it's not being enforced [28] against——

Judge HILL. Suppose they won't file?

Mr. BAILEY. Well, Your Honor, I think of course—you mean the District Attorney won't file?

Judge THORNBERRY. Won't accept the Complaint?

Judge HILL. Yes.

Mr. BAILEY. Well, Your Honor, I think we're getting into a situation here that we're in sort of a novel experience—of this Plaintiff's wanting to force the District Attorney to file a criminal Complaint, and I don't know of any case where I ever heard either possibly a State Court in some particular case, but I don't believe I remember one where a Federal Court has ordered a State District Attorney to file a particular criminal action.

Judge THORNBERRY. Would an action for mandamus lie in the State Court—to mandamus a District Attorney to accept a Complaint?

Mr. BAILEY. Counsel here might illicit a little bit more information on that. I think one of the problems you've got there is—he might could do it. The only problem you'd run into there is to exercise a mandamus; the Court would have to show that the man—that the District Attorney didn't exercise his discretion.

[20] Judge THORNBERRY. He didn't exercise his responsibility as provided by law.

Mr. BAILEY. Mandamus doesn't issue if he has a discretion in it, and I think in most of these cases it would be hard to show that he doesn't have discretion as to the evidence and such as this.

Judge HUGHES. Do you think it could be raised in a civil case by the mother filing suit against the father for child support?

Judge HILL. Just in common law?

Judge HUGHES. Yes.

Mr. BAILEY. Yes—it could be brought this way—yes, I think it could.

Now, getting to the merits, I think the main thrust of the Plaintiff's argument as to the so-called unconstitutionality or unconstitutional application of these two statutes are the two companion cases of Levy and Blohm.

As the Court is aware, in there you had a Wrongful Death statute that the Louisiana Courts have said where it said "child", it meant legitimate child. The Supreme Court held this unconstitutional, and this is the main thrust that the Plaintiffs are making here is that this doctrine of Levy should be expanded; that we shouldn't treat the legitimate and the illegitimate in these child support statute cases differently. [30] Before I make a few comments upon Labine, I think that you can understand Labine a little bit more—I feel you can—if you look at what went after Levy and before Labine. In one of the cases of *Jerry Vogel Music Company* versus *Marks Music Company*, which was a 1969 Second Circuit case, I think the opinion of the Court in this case showed some of the real dangers. They did not pass upon this particular issue that we have here or whether Levy was going to be extended to include the father as well as the relationship with the mother, but I think the comment of the Court was—the Court said that this will ultimately probably be decided by the Supreme Court, but I think the Court did sound a warning there that you're talking about literally hundreds of statutes that are going to be affected not only in Texas but in each and every State.

Also, you've got the question of the fact that the common law—the way the common law operates in this particular field. It's a very interesting comment upon it, but even more important was the case that was decided very shortly after Levy, and that was the King case, which this Court is aware of the significance of this case—*King* v. *Smith*—in the welfare area. In

this—while the Court decided *King* v. *Smith* on statutory [31] grounds, Justice Douglas, who wrote the Levy case, concurred in King but on the grounds that Levy should be used in this particular case rather than the grounds that the Court used. The Court did not buy this nor was he joined by any other of the members in his concurring Opinion. So apparently the Court did not wish *King* versus *Smith* to extend the doctrine of Levy, and I think it's pretty important to see why.

In Alabama only legitimate children are entitled to support from their parents. Had the Court felt that Levy gave the right to these children to support from their natural father, then they could not have decided *King* versus *Smith* the way they did; they could not have knocked out the man-in-the-house Rule, because if you look at some of the comments that I quoted in my Brief of the Court in here—they base this upon the fact their decision in there on the statutory is that this child had no right to go against this parent or to look for support. This was the basis that they decided the King case on. With Justice Douglas trying to extend the doctrine of Levy into this case, I think you can see that the Court did not want to extend Levy any further than it had at this time. They had a perfect opportunity, but it would have completely disrupted this welfare concept that they were working on, and it would have either—you would have come to a completely different [32] decision in King because a lot of these children that were put on welfare rolls would not have been eligible if Levy had been extended to it.

Then along comes Labine, which the Court is aware of, and the point there that the Court mentioned is this insurmountable barrier to the child. We submit that there's no showing here in Texas of any insurmountable barrier. Certainly the child cannot avail itself of these two particular statutes, just like the child couldn't avail itself the same as a legitimate child of some of the statutes dealing with descent and distribution in Louisiana, but an insurmountable barrier—we submit not, because here the child—the father can always come in and adopt the child and can come in and take over to where there is a legal point.

Judge Hughes. But you've got to look at it from the standpoint of the child, not the father, and there is, I think, an insurmountable barrier as far as the child is concerned. The child has no remedy in Texas; now, the father—yes, but you're not dealing with the father.

Mr. Bailey. Yes, Your Honor, but again—this I think is part and parcel of it because there was an insurmountable barrier for this child to inherit also under their laws. The father had to take the incentive in Louisiana for there to be any inheritance by the [33] illegitimate child. He had taken part of this by recognizing the child, but he hadn't done some of the other steps, so until the father acted in Louisiana, there was an insurmountable barrier.

The Court said as long as there was a way that the child could possibly get support by the father's action, then this was no insurmountable barrier. This is exactly what we have here.

Judge Thornberry. How can the child here get support from the father, just the father voluntarily doing it?

Mr. Bailey. Well, I think, Your Honor, there are quite a few court cases; Judge Hughes is aware of some of them in there. There are certain ways—certain actions that can be taken which amount almost to adoption from the standpoint of support, but he could adopt the child. The fact that it's illegitimate today—he may come in, marry again, or adopt the child, or there are ways that he can provide for it in his Will such as this.

The difference in Levy was this—the effect of Levy was that there was absolutely no way at all that an illegitimate could get any benefit under that statute. [34] In other words, they had either wrongful death action or not. Labine came in and said the father could have done some things that would have let this child have some rights. We submit this can happen today in Texas. The father can do some things. So there is no insurmountable barrier, and I think one thing that the Court did—the Court may have looked a little harder at Levy in this decision. I think the fact that it went four this way, one concurring, and four dissent—shows that the Court may have felt like Levy went a little further than they wanted to, that it was liable to create chaos among the States, and that they at least for the time being if not forever are going to stop Levy right where it is and not extend this doctrine, because there's no question that what the Plaintiffs are asking today is an extension of Levy.

Judge Hill. Aren't damages for wrongful death a loss of contributions and support to the child? Isn't that basically what Levy is based on—the lack of support that the child suffered as a result of the parent's death?

In that sense we wouldn't be extending the theory of Levy beyond the scope of that decision, would we, to this fact situation? This is a support case, too, in that sense.

[35] Mr. BAILEY. Well, in that sense—yes, Your Honor, but I think you have to go a lot further than the Court did there. In other words, you don't have the wrongful death situation in Louisiana unless they enact the statute. In other words, they were completely innocent. There was absolutely no way in a wrongful death situation, regardless of what anybody did, that an illegitimate child could ever get any support. We submit that this is not the case here in Texas.

Judge HILL. Well, it was until the Levy case, wasn't it?

Mr. BAILEY. No, Your Honor, as I said, there are ways so that if the father comes back and decides to legitimatize the child or to adopt the child, there are ways. Here there was nothing that anybody could do to alleviate the denial of this money under the Wrongful Death statute as to an illegitimate—that was it, but there are ways here just as there are ways in this—you see, what happened in this other case—the way the Louisiana statutes were, the father had to do some things before the child could collect from the Estate. He had done some of these but not all of them. The Court says that while this is too bad that they're so stringent and you've got to have some money, that "we think the State has the control in this area; there is [36] no Fourteenth Amendment, due process, or equal protection question here."

We submit this is exactly what we've got here because there are things right now under our law in Texas that would allow the father of an illegitimate child to come in and assume the responsibility and put him to the point where he is liable under 4.02 and 602 if he doesn't support the child, and this, we submit, is identical in this respect to Labine, in that there is no absolute prohibition against him doing that in Texas. I think we would have a Levy case if the State of Texas had a statute that said this—a father of an illegitimate child cannot adopt the child, cannot assume the responsibility of it. Then there would be an absolute insurmountable barrier for this child to ever collect from his natural parents, and I think this is it.

Judge THORNBERRY. Mr. Bailey, may I ask you a question—you don't contend here, do you, assuming that there is jurisdiction on all other grounds—you have argued against that—

that the District Attorney would if requested bring action against this father?

Mr. BAILEY. Well, of course I can't speak for the District Attorney. I would say this, Your Honor. He could do this, but here is what he's faced with. If the District Attorney brought a criminal complaint [37] under 602 against one or more of these particular plaintiffs, the father of their child, then he could bring this—nothing in the world would stop him, but the case of *Beaver* versus *State* would throw out every conviction that he's gotten because it says that "child under 602 means legitimate child", so he could bring all of them he wanted to, but I doubt if he would have too good a case.

Judge HUGHES. How would you suggest that this would ever reach a Court for a decision?

Mr. BAILEY. Well, one way that it could on the criminal aspect of it, I presume, would be—and some type of mandamus may be against the District Attorney to file something like this—our Appellate Courts might ride on it there, they might not. The only other way would be for somebody charged under 602—the natural parent of a legitimate child.

If I were charged with failing to support my children under it, I presume I could raise this issue by saying it was unconstitutional because it only applies to where you've got legitimate children involved, and it's discriminatory against a father who marries—

Judge HUGHES. Actually it doesn't say that, though, it just says "children".

Mr. BAILEY. The Courts have interpreted "chil [38] dren" in each of these to mean a legitimate child just as they have in Louisiana.

We submit, really, that what we're faced with here—Counsel is well aware this is a problem that the Welfare Department is concerned with; there have been efforts to get legislation in this area; there are efforts going on today in this area to make these fathers of illegitimate children assume some of this responsibility.

I'm not up here arguing today for the moral end of this situation, because I certainly would like to see this also. I think the Welfare Department in Austin, whom I represent, would like to see some of these fathers have to assume the responsibility, but we submit that this is a matter that is best done in the legislative halls because the problems that we would have here would just be—if this Court declares these statutes we're

talking about unconstitutional—then every child support payment existing in the State of Texas today is subject to the man getting up and saying "This Court has held it unconstitutional, I'll pay no more."

Judge HUGHES. We wouldn't do that.

Judge THORNBERRY. No.

Judge HUGHES. And he's no asking for that now. In his Amended prayer he's only asking us to [39] interpret the statute, not to declare it unconstitutional.

Mr. BAILEY. Well, I am going on the basis just of course on what I was saying here.

Judge THORNBERRY. I think he said his argument as an alternative, he'd like to see it stricken down.

Mr. BAILEY. Yes.

The other aspect of it is that I think the repercussions of this case would go beyond this also, because I think the minute that this statute goes or this interpretation gets this way, unless it's by statute, we're going to see some people in the welfare area that are going to be hurt by this, too, because if that illegitimate father has responsibilities for that child—we may get into the area that these children that are now receiving this benefit are no longer eligible because of both the State and Federal laws in this area.

For this reason we submit that the Court should not take jurisdiction, we do not believe that it has been shown in this case, and that on the merits that they are not entitled to the relief asked for.

I think that's all, Your Honor.

Mr. TURLEY. Your Honor, the Court does have [40] jurisdiction in this case, first, for the jurisdictional amount under Section 1983 "where an individual or State official acts under color of law, then the jurisdictional amount need not be specifically proven to the Court." We alleged it and we think the Court can take judicial notice that in 18 years child support payments will reach $10,000. Under Araticle 1983, then, the jurisdictional amount is here.

Now, with respect to whether Henry Wade is a proper State official for a 3-Judge injunction, he is, Your Honor. He is a State official—granted he's locally elected, but he applies State law and as such under *Spellman* versus *Motor Sales*—*Spellman Motor Sales* versus *Dodge* in 1935 the Courts clearly held that he's a proper State official for this kind of a court, so this Court does have jurisdiction to consider the matter.

I grant the Court that what we're talking about is something very serious. We've got 19,000 illegitimate children born in this State every year and the rate is increasing. It's not an easy problem to deal with. However, I submit to the Court likewise that simply because it's a hard problem, might involve some welfare problems, and might involve perhaps changing up the procedure whereby the Criminal Attorney brings [41] actions is nonetheless no reason at all to just completely ignore the Constitutional rights of these children. I don't think the Court has ever done it, and I don't think they will in this instance.

Incidentally, Your Honor, I'm not withdrawing the pleading; I would hate to see the Court have to go so far in this instance and I quite frankly don't believe the Court need go so far as to strike down and hold as unconstitutional the two statutes involved, but because of the magnitude of the problem, the serious Civil rights involved, I am willing and have asked the Court if that be necessary, that that be done, for the simple reason, Your Honor, that this State has never enacted any rights to protect in child support matters the rights of the illegitimate.

Beaver versus *State* was decided in 1923. The Legislature hasn't done a thing about it since. The very thing that the Court did in *Beaver* versus *State* when they said "Children means legitimate children"—I am simply asking this Court to say that the word "children", if it means legitimate alone is unconstitutional. That's all I'm asking this Court to do and I think that's all we have to do in this instance.

The State of Texas has admitted in their Brief and admitted in their oral argument that the situation [42] before us is that it is morally right that the father support the illegitimate child.

Under these circumstances, Your Honor, I simply fail to see—when the only other possible remedy is for this person to some way or another go to Henry Wade's office and file an action and some way or another go to the District Court and file a Civil Action and work these through at trials in the trial courts and through the Courts of Civil Appeals and the State Supreme Court and then into the Federal Appellate Courts and finally perhaps the United States Supreme Court—it seems to me that the State of Texas has made it abundantly clear throughout the years—the Courts and then the Legislature, and the Attorney General does not deny the fact that there is

no right of support for children in this State. I simply want to shortcut this matter, which I think the Rules of Federal Procedure do provide.

Judge THORNBERRY. Thank you. The Court will take the case under advisement.

We thank Counsel on both sides.

The MARSHAL. Court is adjourned.

(These 3-judge proceedings concluded at this time.)

[Certification of record omitted.]

ORDER GRANTING LEAVE TO FILE PLAINTIFF'S THIRD AMENDED COMPLAINT

[Number and title omitted] (Filed May 26, 1971)

Came forth on this 26th day of May 1971, the Plaintiff, submitted in letter form her request to file her Third Amended Complaint, and the Court after having considered said request is of the opinion that it should be granted, and leave is hereby extended to the Plaintiff to file her Third Amended Complaint.

SARAH T. HUGHES,
Judge.

PLAINTIFF'S THIRD AMENDED COMPLAINT

[Number and title omitted] (Filed May 26, 1971)

I. PARTIES

1. Plaintiff, Linda R. S. is a citizen of the State of Texas, and a resident of Dallas County, Texas.

2. Plaintiff's minor daughter is a citizen of the State of Texas and resides with Plaintiff in Dallas County, Texas.

3. Plaintiff sues on behalf of herself, her minor daughter, and on behalf of all other women and minor children who have sought, are seeking, or in the future will seek to obtain support for so-called illegitimate children from said child's father. The number of members of the class is large and joinder of all members is impractical; there are questions of law and fact common to each class; the claims of Plaintiff are typical of such class; and the named Plaintiff will fairly and adequately protect the interests of the class.

4. Defendant, Richard D., is a citizen of the State of Texas and a resident of Dallas County, Texas.

5. Defendant, State of Texas, is a party hereto in that certain laws and enactments of the State of Texas infringe the Federal Constitutional rights of Plaintiff, Plaintiff's minor daughter, and others similarly situated. Notice of this suit is given to Honorable Preston Smith, Governor of the State of Texas, and to Honorable Crawford Martin, Attorney General for the State of Texas.

6. Dallas County District Attorney, Henry Wade, who is given the duty to enforce in Dallas County the provisions of the Texas Penal Code, Article 602, is made a Defendant herein.

7. Justice Robert Calvert, Chief Justice of the Texas Supreme Court, the highest Court in the State of Texas and which Court has the duty of interpreting and applying Civil Statute, Article 4.02 of the Texas Family Code, is made a Defendant herein.

8. Crawford Martin, Attorney General for the State of Texas, has been given notice of this suit and appeared herein, and is made a Defendant herein.

II. JURISDICTION

1. Plaintiff invokes the jurisdiction of this Court under the NINTH and FOURTEENTH Amendments to the United States Constitution; and under Title 28, United States Code, Sections 1331, 1343, 2201, 2202, 2281, and 2284; and Title 42, United States Code, Section 1983.

2. Plaintiff seeks (a) a Declaratory Judgment that Article 4.02 of the Texas Family Code, and Article 602 of the Texas Penal Code are unconstitutional on their face, and have been unconstitutionally applied so as to systematically exclude unwed mothers and children of unwed mothers from the benefits of such laws; (b) a permanent mandatory injunction to prevent the further exclusion of such class of persons from the protection of the laws of the State of Texas.

3. Although this suit is concerned with a deprivation of Plaintiff's civil rights and as such is an exception to the $10,000.00 jurisdictional amount, Plaintiff would nonetheless show the Court that more than $10,000.00 is involved in depriving Plaintiffs of Defendant, Richard D.'s support.

III. STATUTES

1. Article 4.02 of the Texas Family Code provides:

"*Each spouse has the duty to support his or her minor children.* The husband has the duty to support the wife and the wife has the duty to support the husband when he is unable to support himself. A spouse who fails to discharge the duty of support is liable to any person who provides necessaries to those to whom support is owed."

2. Article 602 of the Texas Penal Code provides:

"Any husband who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his wife who may be in necessitous circumstances, or any parent who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not more than two years."

IV. FACTS

1. Plaintiff and Defendant, Richard D., cohabited for a period of several months in 1969 and 1970 during which time Plaintiff became pregnant by the Defendant, Richard D.

2. On October 3, 1970, Plaintiff gave birth to a girl baby, of which child Richard D. is the father.

3. Although requested by Plaintiff many times to do so, Defendant, Richard D., has refused to either marry Plaintiff or support their minor daughter.

4. Plaintiff has very little money and cannot support the parties' minor daughter in a manner equal to the opportunities and privileges of a father supported child.

5. Plaintiff's minor daughter is not entitled to receive and in all reasonable probability will not receive support from any source other than her natural parents.

6. The laws of Texas as written and as applied give the Plaintiff's child no rights of support from her father, but said laws do provide other children that right against a father who has married the child's mother.

7. Unless this Court requires Defendant, Richard D., to contribute to the support and upkeep of his minor daughter said child will experience great economic hardship for the next eighteen (18) years, which hardships she would not otherwise

have to endure, and which will deprive her of equal privileges and opportunities of similarly situated father supported children.

8. Plaintiff, Linda R. S. has been and will continue to be subjected to economic coercion by the State of Texas in that she recognizes that her child cannot be raised with equal rights and opportunities such as similarly situated father supported children.

9. Because of such state enforced economic hardship, Plaintiff and others similarly situated are not permitted to freely elect between keeping and rearing their child and the alternatives of placing that child for adoption or even having its birth aborted.

10. Unless Defendant, Richard D., be required to contribute to the support of such child, Plaintiff will be required to choose between giving her child up for adoption and rearing by other parties, or subjecting the child to a life of unequal rights, unequal opportunities, and unequal support as compared to father supported children.

11. This is a proper case to be heard by a Three-Judge Court in that Plaintiff is challenging state statutes as invalid on their face under the United States Constitution, and is seeking an injunction against the discriminatory enforcement of said statutes, and is of significant public concern.

12. On May 25, 1971, Plaintiff made application to Dallas District Attorney, Henry Wade, for enforcement of the provisions of Article 602 of the Texas Penal Code against Defendant, Richard D. The District Attorney's Office refused to accept the case because Plaintiff and Defendant, Richard D., had never married and, therefore, according to the District Attorney, Plaintiff was not entitled to the benefits of Article 602. An Affidavit from the District Attorney's Office is attached hereto.

V. CAUSES OF ACTION

1. The child support provision of Article 4.02 of the Texas Family Code and Article 602 of the Texas Penal Code are unconstitutional on their face.

2. Said statutes deprive unwed pregnant women and unwed mothers of their federal constitutional rights as guaranteed in the NINTH and FOURTEENTH Amendments to the United States Constitution, to-wit:

A. Said Texas statutes, laws and customs have deprived Plaintiff of the fundamental rights of all women to freely choose whether to bear children.

B. They deprive Plaintiff of the fundamental right of all mothers to freely choose whether to keep their children.

C. Said statutes, laws and customs deny Plaintiff equal protection of the laws.

D. Said Texas statutes, laws and customs deny, without due process of law, Plaintiff's rights to have and keep her child.

3. Said Texas statutes, laws and customs deprive Plaintiff's minor daughter, and other children of unwed mothers of their Federal Constitutional rights protected by the NINTH and FOURTEENTH Amendments to the United States Constitution, to-wit:

A. They deprive said child of the equal protection of the laws.

B. They deprive said child of the fundamental right of all children to support from their natural father.

C. Said statutes deny, without due process of law said child's fundamental rights of equal opportunities and privileges of other children receiving support from their fathers.

4. Provisions of Article 4.02 of the Texas Family Code and of Article 602 of the Texas Penal Code discriminate against the Plaintiff's minor child solely because of circumstances surrounding the child's conception. Said statutes are not supported by any overriding and compelling state interest and in fact operate to the detriment of the citizens of Texas who often must ultimately bear the support of said children.

VI. RELIEF REQUESTED

1. Plaintiff prays that a Three-Judge Court be convened to hear this cause.

2. Plaintiff prays that a Declaratory Judgment be issued holding the Texas Child Support Laws unconstitutional in their exclusion of children of unwed parents.

3. Plaintiff prays that a permanent mandatory injunction issue, requiring the State of Texas and its state officers to cease their discriminatory application of Child Support Laws, and that Defendant, Richard D., be required to pay a reasonable amount of money for the support of his child, that De-

fendants be compelled to pay costs of Court, and such further relief at law or in equity as Plaintiff may be entitled to receive.

Respectfully submitted,

McKool, McKool, Jones, Shoemaker and Turley.

By WILDER TURLEY,
Attorney for Plaintiff.

[Certificate of service omitted.]

HENRY WADE,
DISTRICT ATTORNEY,
Dallas Tex., May 25, 1971.

Re Linda R. Shell, Complaint for nonsupport.

This office is unable to take any action against Kenneth R. Defenbaugh, alleged to be the father of Kendra Renee Defenbaugh, a female child born October 3, 1970, for enforcement of child support.

This policy is due to caselaw construing Art. 602 of the Penal Code to be inapplicable to fathers of illegitimate children.

CATHARINE T. HILL,
Assistant District Attorney.

Subscribed and sworn to before me, this 25th day of May, 1971.

RUBY L. MIMMS,
Notary Public in and for Dallas County, Texas.

(Affidavit referred to in paragraph 12, page 4, of plaintiff's third amended complaint.)

DEFENDANTS' MOTION IN OPPOSITION TO PLAINTIFFS' MOTION TO AMEND PLEADINGS AND TO OFFER ADDITIONAL EVIDENCE

[Number and title omitted] (Filed June 3, 1971)

To the Hon. Judges of said court: Come now the Defendants herein and in reply to Plaintiffs' Motion to Amend Pleadings and Introduce Additional Evidence, file this their motion in opposition thereto and as grounds therefor would respectfully show the Court as follows:

I.

The instant proceeding was filed on the 3rd day of December, 1970, and the initial answer was filed shortly after the 21st day of December, 1970.

II.

That on the 21st day of January, 1971, a preliminary pretrial conference was held before the Court at which time the attorneys informed the Court that the case could and would be submitted upon stipulations.

III.

That on or about the 22nd day of March, 1971, stipulations agreed upon were filed with the Court.

IV.

That on the 16th day of April, 1971, the case was tried before the Court after announcements of ready by all parties.

V.

That during the course of such trial the Plaintiffs did not request permission to make any trial amendments of their pleadings nor did the Plaintiffs seek a delay of the trial on the grounds that certain evidence was unavailable at that time.

VI.

That thirty-nine (39) days after the trial of the case, the Plaintiffs now seek to amend their pleadings to include certain additional factual allegations and submit such evidence to the Court for consideration.

VII.

That such evidence is not newly discovered evidence that was unavailable to Plaintiffs at the time of trial. Such evidence was not even in existence at the time of trial. Such evidence deals with events occurring after the trial of the case and was in fact manufactured or created by the very action of the Plaintiffs.

VIII.

That the actions taken by the Plaintiffs could have been taken prior to the filing of this suit or during its pending for trial.

IX.

That this attempt to inject this created evidence at this stage of the proceedings constitutes nothing more than an effort to overcome a lack of due diligence in presenting the case to the Court upon trial or an effort to bolster and improve the record after trial.

X.

Defendants submit that nothing in the Rules of Federal Procedure allows or authorizes such patently unjust and unfair procedure, especially in view of any allegation or showing that such evidence could not have been available at the time of trial with the exercise of any degree of diligence.

XI.

That this piecemeal manner of presenting Plaintiffs' case for trial subjects the Defendants to the alternative of either agreeing to the including of such evidence in the record without being able to avail themselves of the safeguards available to the Defendants pursuant to the Federal Rules of Civil Procedure pertaining to discovery, or being subjected to the additional and unnecessary expenditure of time and money to ascertain the validity of these new allegations and rebut or counter the same by evidence, briefs or argument.

XII.

Defendants submit that the Court should disallow the filing of amended pleadings or the including of additional evidence in the record without a showing by the Plaintiffs that they have exercised due diligence in making this evidence available.

Wherefore, Premises Considered, Defendants pray that Plaintiffs' Motion to Amend and Introduce Additional Evidence be denied.

CRAWFORD C. MARTIN,
Attorney General of Texas.
PAT BAILEY,
Assistant Attorney General.

Attorneys for defendants, P.O. Box 12548, Capitol Station, Austin, Texas 78711.

[Certificate of service omitted.]

MEMORANDUM OPINION AND ORDER

[Number and title omitted] (Filed November 1, 1971)

Plaintiff Linda R. S. brings this suit "on behalf of herself, her minor daughter, and on behalf of all other women and minor children who have sought, are seeking, or in the future will seek to obtain support for so-called illegitimate children from said child's father." Named as defendants are Richard D., the alleged father of plaintiff's child; the State of Texas; Dallas County District Attorney Henry Wade; Honorable Robert W. Calvert, Chief Justice of the Texas Supreme Court; and Honorable Crawford Martin, Attorney General for the State of Texas. The relief requested by plaintiff is a declaratory judgment that two Texas child support laws are unconstitutional in their exclusion of children of unwed parents, a permanent mandatory injunction requiring the State of Texas and its officers to cease their alleged discriminatory application of the child support laws in question, and an order requiring Richard D. to pay child support.

Plaintiff alleges that she lived with defendant Richard D. for several months, became pregnant by him, and gave birth to his baby girl in late 1970. Plaintiff contends that the father refuses either to marry her or to support the child. She has requested that this three-judge court be convened to consider her contention that two Texas statutes are unconstitutional. The statutes in effect require fathers to support their legitimate but not their illegitimate children. The Court is of the opinion that this is not a proper case for three judges and remands to the District Judge to whom the application for relief was originally presented.

Congress passed the first three-judge court statute in reaction to the United States Supreme Court's decision in *Ex parte Young*, 209 U.S. 123 (1908). In *Young* a federal district court temporarily enjoined the Minnesota Attorney General from enforcing Minnesota's maximum rates for railroad operation. The Supreme Court upheld the district court's power to grant the injunction and a flood of litigation by utilities followed. Many district courts struck down state statutes with abandon, and in 1910 Congress required that three judges were necessary to enjoin a state official from enforcing a state statute. The

present three-judge court statute, 28 U.S.C. § 2281, is quoted below.[1]

Because of the burdensome aspects of three-judge courts, the Supreme Court has narrowly construed § 2281. The following conditions must be met for a three-judge court to be properly convened:

(1) An interlocutory or permanent injunction must be sought.

(2) The injunction must be sought to restrain the enforcement of a state statute.

(3) The injunction must be sought against a state official.

(4) The statute must be challenged on grounds of federal unconstitutionality.

Plaintiff has challenged the constitutionality of two Texas statutes.

ARTICLE 602

Article 602 of the Texas Penal Code provides:

> Any husband who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his wife who may be in necessitous circumstances, or any *parent* who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his or her *child or children* under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction shall be punished by confinement in the County Jail for not more than two years. (Emphasis added.)

This three-judge court has been properly convened insofar as the challenge to Article 602 is concerned.

Article 602 provides that any "parent" who fails to support his "children" is subject to prosecution. However, Texas courts have held that only parents of legitimate children are amenable to prosecution under the statute. *Beaver v. State*, 256 S.W. 929 (Tex. Crim. App. 1923). Therefore the proper party to challenge the constitutionality of Article 602 would be a parent of a legitimate child who has been prosecuted under the statute. Such a challenge would allege that because the parents of

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[1] 28 U.S.C. § 2281 provides:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

illegitimate children may not be prosecuted, the statute unfairly discriminates against the parents of legitimate children.

Linda R. S., plaintiff, cannot be prosecuted under the statute because the minor child involved in this case is illegitimate. Plaintiff therefore lacks standing to challenge the statute and this portion of her case must be dismissed.

ARTICLE 4.02

Article 4.02 of the Texas Family Code provides:

> Each spouse has the duty to support his or her minor children. The husband has the duty to support the wife and the wife has the duty to support the husband when he is unable to support himself. A spouse who fails to discharge the duty of support is liable to any person who provides necessaries to those to whom support is owed.

This statute is enforceable through a civil suit for damages against a defaulting spouse. There is no state official involved in the enforcement of Article 4.02. Since § 2281 provides that a three-judge court is proper only to enjoin a state official from enforcing a state statute, a three-judge court may not consider the challenge to Article 4.02. This portion of the case must be remanded to the judge to whom the application for injunction was originally presented.

We note in passing a further difficulty with this case. Plaintiff is requesting that a mandatory injunction issue against Henry Wade, the Dallas County District Attorney, ordering him to prosecute Richard D. and, apparently, all other fathers of illegitimate children who have refused to support them. Richard D. has never appeared in this case. Moreover, Linda R. S. and the State of Texas, without Richard's participation, stipulated that Richard is the father of Linda's child.

The portion of the case challenging Article 602 has been properly brought before this three-judge court. The Court dismisses the challenge to Article 602 for lack of standing.

The portion of this case challenging Article 4.02 is improper for the consideration of three judges. This three-judge court disbands as to the challenge to Article 4.02 and remands this portion of the case to the judge to whom the application for injunction was originally presented for further proceedings.

It is so ordered.

DISSENTING OPINION

[Number and title omitted] (Filed November 1, 1971)

Hughes, District Judge, dissenting:

I concur in the majority opinion that plaintiffs' challenge to the constitutionality of Article 602 of the Texas Penal Code has been properly brought before a three-judge court. I likewise concur in the majority opinion that the portion of the case in which the plaintiffs challenge Article 4.02 of the Texas Family Code is improper for the consideration of three judges and should be remanded to the initiating judge for further proceedings.

I dissent from the majority opinion that Linda R. S., plaintiff, for herself and her child and the class she represents, has no standing to challenge the constitutionality of Article 602 of the Texas Penal Code.

Article 602 provides in part that "any parent who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor . . ."

The statute has been construed by Texas courts to apply to the support of legitimate children but not to the support of illegitimate children. It is this application of the statute which is being challenged by Linda R. S.

Dated: Original filed November 1, 1971.

_____,
United States Circuit Judge.
(Original signed by Judge Thornberry.)

_____,
United States District Judge.
(Original signed by Judge Hill.)

_____,
United States District Judge.

DISSENTING OPINION

[Number and title omitted] (Filed November 1, 1971)

Hughes, District Judge, dissenting:

I concur in the majority opinion that plaintiffs' challenge to the constitutionality of Article 602 of the Texas Penal Code has been properly brought before a three-judge court. I likewise concur in the majority opinion that the portion of the case in

which the plaintiffs challenge Article 4.02 of the Texas Family Code is improper for the consideration of three judges and should be remanded to the initiating judge for further proceedings.

I dissent from the majority opinion that Linda R. S., plaintiff, for herself and her child and the class she represents, has no standing to challenge the constitutionality of Article 602 of the Texas Penal Code.

Article 602 provides in part that "any parent who shall willfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor . . ."

The statute has been construed by Texas courts to apply to the support of legitimate children but not to the support of illegitimate children. It is this application of the statute which is being challenged by Linda R. S.

The majority seeks to dismiss for lack of standing the question of the constitutional application of Article 602. This position is clearly dubious when considered in the light of recent opinions of the Supreme Court which have significantly altered the focus of the standing test. The Court in *Baker v. Carr* announced that standing exists when the complainant has "such a personal stake in the outcome of the controversy as to assure . . . concrete adverseness. . . ." 369 U.S. 186, 204 (1962). In *Flast v. Cohen* the retreat from requiring a "recognized legal interest" continued when the Court declared that if the required "nexus" exists between the claimant's status and "the nature of the . . . unconstitutional action" then "the issues will be contested with the necessary adverseness . . . to assure that the constitutional challenge will be made in a form . . . capable of judicial resolution." 392 U.S. 83, 106 (1968). The question of whether a litigant has standing does not rest on some artificial determination of whether there is a "recognized legal interest" but rather whether the Court should grant judicial review in order that justice may be done.

Since 1968 the Supreme Court has redefined the test for standing to mean that it arises when there is "injury in fact, economic or otherwise," within the "zone of interests to be protected" by the law in question. *Data Processing Serv. Organizations v. Camp*, 397 U.S. 150, 152-53 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970). In *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 6 (1968), the Court stated that when a particular

statutory provision indicates a legislative intent to protect a specific interest or to prohibit certain conduct, the party injured by nonfeasance or misfeasance of the governmental agency in the enforcement of the provision has standing to require compliance with that provision. A person for whom the statute was designed to protect would have standing to bring a suit to enjoin an alleged violation of that statute.

Certainly the plaintiffs present the requisites for standing to challenge the constitutionality of Article 602. Linda R. S. and her minor daughter and the class of unwed mothers and illegitimate children have a personal stake in the constitutional application of the statute. The contested statute provides for the protection of a "child" from desertion and non-support by its "parents." The legislature demanded that parents care for and support their offspring and considered this fundamental duty so highly that it attached a criminal penalty for breaching it. As with other criminal laws, members of society have the right to expect that the agents of the state upon proper complaint will prosecute the law made by them for their protection. Clearly the statute was designed to compel parents to provide for their minor children under the threat of penal action. *Smith* v. *Given*, 97 S.W.2d 532, 534 (Tex. Civ. App. — Dallas 1936). The discriminatory practice of the governmental agencies in not prosecuting and enforcing this legislative directive against parents of illegitimate children does result in an "injury in fact" to the plaintiffs. The Supreme Court has held, moreover, that unequal treatment is indicative of an injury sufficient to support standing to sue. *Allied Stores* v. *Bowers*, 358 U.S. 522 (1959).

The plaintiffs are surely within the "zone of interest" that the legislature intended to protect with Article 602. The statute on its face protects the welfare of minor children. The plaintiffs complain, however, that the state has discriminated in the failure of the state to apply the statute to illegitimate minor children solely on the basis of their procreation by unwed parents. The plaintiffs are within the class of persons that should be protected, and the activity of the state in the application of the statute clearly results in a direct injury and a deprivation of their constitutional right of equal protection. The Court has approved standing when the parties are "directly affected by the laws and *practices* against which their complaints are directed." (emphasis added). *School District* v. *Schempp*, 374 U.S. 203, 224 n. 9 (1963).

The majority contends that only the parent of a legitimate child being prosecuted under the law has standing to challenge the discriminatory application of the statute. They say that only he is being injured by the discriminatory prosecution of Article 602. This proposition is untenable. Clearly the State's conduct in the enforcement of the challenged statute has injured the plaintiffs and adversely affected their interests.

The plaintiffs seek as relief first, a judgment declaring Article 602 unconstitutional on its face and as applied because of the systematic exclusion of unwed mothers and children of unwed mothers from the benefit of the law; and second, an injunction to prevent the further exclusion of such persons from the protection of the statute.

Jurisdiction is based on 28 U.S.C. section 1343 (3)(4).[1] The defendants contend that the plaintiffs have not alleged sufficient facts to confer jurisdiction upon the court under 28 U.S.C. section 1983. In particular, it is contended that this case is not ripe for federal action. It is true that when the case was filed, the plaintiffs had not made any attempt to file a complaint against Richard D. The Supreme Court held, however, in *Pierce v. Society of Sisters*, 268 U.S. 510, 536 (1925), that it is not necessary for the plaintiffs to attempt prosecution prior to filing suit. In *Pierce*, the plaintiff challenged the constitutionality of an Oregon statute requiring children to attend public schools at a certain age. The suit was held maintainable even though the operative date of the statute was two years away. In explaining its decision the Court said:

> "The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the Act, the injury would have become irreparable. Prevention of impending injury is a well recognised function of courts of equity." 268 U.S. at 536.

Although it is the opinion of this writer that the failure of the plaintiffs to initiate official State action to prosecute Richard D. would not defeat jurisdiction, Linda R. S. conclusively established jurisdiction when she attempted to file a complaint

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[1] 28 U.S.C. section 1343(3)(4), provides:
"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
(3) To redress the deprivation, under color of any State law . . . of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens . . .
(4) To . . . secure equitable or other relief under any Act of Congress providing for the protection of civil rights.

with the District Attorney of Dallas County and he refused to prosecute. The case is therefore ripe for federal action.

In view of *Younger v. Harris*, 401 U.S. 37 (1971) and companion cases, the question of abstention must likewise be examined. These cases have narrowed the jurisdiction of federal courts in criminal cases from the broad holding of *Zwickler v. Koota*, 389 U.S. 241 (1967) which stated that a declaratory judgment was proper to construe a statute prohibiting anonymous election literature even if there was no irreparable injury to justify an injunction.

Younger held that when a State court proceeding is pending, an injunction is improper except "under special circumstances." In the companion case *Samuels v. Mackell*, 401 U.S. 66 (1971), it was held that a declaratory judgment is also improper when a prosecution under the challenged statute is pending in State court at the time the federal suit is initiated. 401 U.S. at 72-73.

A later Supreme Court decision *Askew v. Hargrave*, 401 U.S. 476 (1971) must likewise be examined. A Florida statute governing the school ad valorem taxes was challenged in the federal court as effecting "an invidious discrimination in violation of the Equal Protection Clause." Subsequently, a suit was filed in the State court attacking the statute primarily as violative of provisions of the Florida Constitution. In remanding the case, the Court noted that whenever State constitutional questions can be raised concerning a State law, and the federal court has been asked to construe in some way that State law, the federal court must abstain from any determination pending decision by a State court on the constitutionality of the law, even though the State constitutional issue is not being litigated in the federal court. If the State court decides the state law issues, its action "will obviate the necessity of determining the Fourteenth Amendment question." 401 U.S. at 478.

This case can be distinguished from the recent Supreme Court cases herein cited. In those cases there was a pending suit in a State court involving the same statute that was the subject of litigation in the federal court. Here there is no case pending in a State court involving Article 602 of the Texas Penal Code. Moreover, it does not appear that there is any State ground still to be litigated as in *Askew*. Previously Texas courts have considered the question of the support of illegitimate children and have held that without a specific statute requiring such

support a parent was under no duty to do so. As early as 1887 in *Lane v. Phillips*, 6 S.W. 610, the Supreme Court of Texas declared that the rules of the common law did not impose on a father the duty to support children not born in wedlock.

Beaver v. State, 256 S.W. 929 (Tex. Crim. App. 1923), specifically construed the statute. Defendant had been convicted of failing to support his illegitimate child. The Court in reversing said:

> "The rule of the common law has been so long established and so uniformly recognized that until the Legislature speaks in unmistakable terms showing an intention to change the rule in this state, we must perforce hold that the statute in question does not apply in the present instance."

Although *Beaver* is the only case specifically interpreting Article 602 of the Penal Code, other Texas cases [1] have on several occasions declared that under the common law a father had no duty to support his illegitimate children and without specific statutory authority Texas statutes requiring support of children applied only to legitimate children.

As indicated by this long line of cases beginning in 1887 and proceeding to 1971, it would indeed be useless for this Court to abstain to allow further litigation in the State court. Moreover, there is little likelihood of a case involving Article 602 being prosecuted because, as in this case, the District Attorney has refused to take a complaint. Certainly, this situation falls within the exception of *Younger*, *supra*, that "special circumstances" exist for the federal court not to abstain. I would so hold.

The question on the merits is whether the interpretation by Texas courts of the words "child or children" in Article 602 of the Penal Code to mean legitimate children constitutes an invidious discrimination against illegitimate children. There are three recent Supreme Court decisions crucial to a determination of this issue.

In *Levy v. Louisiana*, 391 U.S. 68 (1968) five illegitimate children filed suit in a Louisiana District Court for the wrongful death of their mother pursuant to the Louisiana wrongful death statute. The Louisiana Courts denied the relief sought

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[1] *Home of the Holy Infancy v. Kaska*, 397 S.W.2d 208 (Tex. Sup. 1965); *Curtis v. State*, 236 S.W.2d 187 (Tex. Crim. App. 1950); *G. v. P.*, 466 S.W.2d 41 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.); *Bjorgo v. Bjorgo*, 391 S.W.2d 538 (Tex. Civ. App.—Amarillo 1965).

by holding that the wrongful death statute only authorized actions in behalf of legitimate children. The Supreme Court held that such a limitation violated the Equal Protection Clause of the Fourteenth Amendment. In part, the opinion said:

> "Why should the illegitimate child be denied rights merely because of his birth out of wedlock? He certainly is subject to all the responsibilities of a citizen, including the payment of taxes and conscription under the Selective Service Act. How under our constitutional regime can he be denied correlative rights which other citizens enjoy?" U.S. at 71.

The Court also noted:

> "We have been extremely sensitive when it comes to basic civil rights and have not hesitated to strike down an invidious classification even though it had history and tradition on its side." *Id.*

The case of *Glona v. American Guarantee & Liability Insurance*, 391 U.S. 73 (1968), decided the same day as *Levy*, contained a variation of the facts in *Levy*. In *Glona* a mother of an illegitimate child was denied recovery by the United States District Court of Louisiana for the death of her illegitimate child under the Louisiana wrongful death statute. The Supreme Court reversed, holding that:

> "the State denies equal protection of the laws to withhold relief merely because the child, wrongfully killed, was born to her out of wedlock." 391 U.S. at 76.

Labine v. *Vincent*, 401 U.S. 532 (1971) considered Louisiana's intestate succession law. Unlike the wrongful death statute, the intestate succession laws made specific reference to illegitimate children, providing that "[i]llegitimate children, though duly acknowledged can not claim the rights of legitimate children . . . ." Plaintiff in *Labine* was an acknowledged illegitimate child; however, the father's estate was awarded to his collateral relations and the child appealed. The Supreme Court refused to invalidate the Louisiana statutory scheme, saying:

> "the choices reflected by the intestate succession statute are choices which it is within the power of the State to make. The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe they can provide better rules." 401 U.S. at 537.

While at first it would appear that in *Labine* the Supreme Court has overruled *Levy* and *Glona*, a closer examination reveals that it can be distinguished. In *Labine* the Court was dealing with the intestate succession laws and thus was concerned with the stability of land titles and promotion of the orderly distribution of property within the state.

After *Levy* and *Glona*, the Supreme Court of Missouri considered the question of support of illegitimate children in *R. v. R.*, 432 S.W.2d 152 (Mo. 1968), and held:

> "The decisions of the United States Supreme Court compel the conclusion that the proper construction of our statutory provisions relating to the obligations and rights of parents affords illegitimate children a right equal with that of legitimate children to require support by their father." *Id.* at 154.

Two other courts,[4] one in Colorado and the other in New York, required equal support rights for illegitimate as well as legitimate children. The New York court noted:

> "In the light of the decisions of the United States Supreme Court . . . state statutes which discriminate against children on the basis of a classification as to whether they were born in or out-of-wedlock must be held to violate the Equal Protection Clause of the Constitution. Certainly there is no area in which such statutes should be more carefully scrutinized than where the support, the care and the education of a child depend on their interpretation." 291 N.Y.S.2d at 519.

Only in cases involving inheritance statutes have the courts[5] drawn the line when it comes to applying *Levy*. These decisions, including the lower court decision in *Labine*, rested on the principle that the protection and stabilization of land titles was sufficient rational basis for discrimination against illegitimates in inheritance statutes.

Texas cases upholding the interpretation of Article 602 that it does not apply to illegitimate children rely entirely on the common law that the father is not responsible for the maintenance and support of an illegitimate child.

Traditional arguments advanced in favor of laws discriminating against illegitimates are that the discrimination promotes

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[4] *Nunez v. Nunez*, 450 P. 2d 68 (Colo. 1969); *Storm v. Nono*, 291 N.Y.S. 2d 515 (N.Y. Fam. Ct. 1968).

[5] *Strahan v. Strahan*, 304 F. Supp. 40 (W.D. La. (1969)); *Labine v. Vincent*, 220 So. 2d 449 (La. Ct. of Appeals 1969); *Of Jerry Vogel Music Co. v. Edwards D. Mark Music Corp.*, 425 F. 2d 884 (2nd Cir. 1969).

morals because it encourages marriages and deters extramarital sexual relations. While the promotion of morals is a legitimate governmental interest, it is doubtful that a rule which permits a father to avoid liability for the support of children born as a result of extramarital relations promotes this purpose. Rather it would seem to encourage promiscuity as it relieves the father of the duty to support. Nor would a rule requiring him to support his illegitimate children appear to destroy the family. There is nothing to indicate that this has been the result of those States imposing liability for the support of such children.

There is, in this writer's opinion, no rational basis for a distinction between legitimate and illegitimate children. The interpretation of the law which denies support to illegitimate children punishes a party (the child) solely because of conditions which were beyond his control and which result from the conduct of parties occurring before he came into existence.

In addition to there being no rational basis for the Texas courts' interpretation of Article 602 such manner of applying the law is an insurmountable barrier to the illegitimate child. Since 1887 Texas courts have held that the present statute does not apply to illegitimate children even though the statute itself simply says "child or children" and does not eliminate illegitimate children. There appears to be no possibility that Texas courts will change their interpretation. The legislature has been told by the courts that statutory authority must be given in order to provide support of illegitimate children. The legislature has never acted and has refused even though bills making such provision have been introduced in the legislature. The only way in which an illegitimate child can receive support at the present time under Texas laws is for the parents to marry, but the child has no control over this alternative and in this case Richard D. has refused to marry Linda R. S. Thus for all practical purposes there is an insurmountable barrier to receiving support under Texas laws for illegitimate children and specifically the child of Richard D. and Linda R. S.

I would, therefore, hold that the present interpretation of Article 602 of the Texas Penal Code by Texas courts excluding children of unwed parents as unconstitutional in violation of the Fourteenth Amendment of the United States Constitution and would issue a permanent injunction requiring State officials

to apply Article 602 in such a way as to require parents of illegitimate children to provide support.

SARA T. HUGHES,
United States District Judge.

APPLICATION TO APPEAL IN FORMA PAUPERIS

[Number and title omitted] (Filed November 30, 1971)

To Hon. Judge Hughes:

Comes now Linda R. S. and files this her Application To Proceed on Appeal In Forma Pauperis pursuant to the provisions of Title 28, Section 1915 of the United States Code. On November 1, 1971, a special three-judge Federal panel comprised of Judge Thornberry, Circuit Judge, Judge Hughes, District Judge, and Judge Hill, District Judge, ruled in a divided decision that the Plaintiff lacked standing to challenge Article 602 of the Texas Penal Code as unfairly discriminating against illegitimate children and mothers of illegitimate children. Plaintiff desires to appeal that portion of the Court's Order, but Plaintiff does not have sufficient funds with which to prosecute said appeal.

The question presented on appeal is not frivolous, but presents a substantial question. This application is made both by Linda R. S. and her minor child. Both are citizens of the United States and the only source of income for said mother and child is made up of approximately $320.00 per month net after taxes income earned by the labor of Linda R. S. Plaintiff is unable to pay costs or give security for costs of this appeal and Plaintiff has made and attached hereto her Affidavit that she is unable to pay such costs or give security therefor.

Plaintiff, Linda R. S. believes that she is, together with the class of mothers and illegitimate children represented by her, entitled to a re-dress of this case by appeal to the United States Supreme Court, and she has set forth her Affidavit as required by Title 28, Section 1915 of the United States Code setting forth the sworn facts justifying this appeal in forma pauperis.

Wherefore, premises considered, Plaintiff prays that an order be entered permitting her to appeal in forma pauperis and that she not be required to pay any filing costs, Court fees, costs of

transcripts or records, or any other such appropriate costs or expenses as may be required in this appeal.

Respectfully submitted.

McKool, McKool, Jones, Shoemaker and Turley.

By Windle Turley,

Attorney for Plaintiff, Linda R. S.

[Certificate of service omitted.]

Affidavit of Plaintiff To Proceed in Forma Pauperis

[Number and title omitted] (Filed November 30, 1971)

State of Texas,

County of Dallas.

My name is Linda Shell, and I am individually and on behalf of my minor daughter Kendra Renee, and on behalf of all other similarly situated mothers and children of unwed parents a Plaintiff in the above styled and numbered cause. I am, as is my minor daughter, a citizen of the United States. We have no source of income or security other than my earnings. I am a regularly employed secretary for an insurance company and my net take home earnings after taxes is approximately $320.00 per month. Neither my minor daughter nor I have money to pay costs or expenses of the appeal of this case or to give security for such costs or expenses of appeal.

I desire to appeal the decision of the three (3) Judge Federal Court rendered on November 1, 1971 in the above styled and numbered cause, wherein the Court held that I did not have standing either individually or on behalf of my minor daughter or the class of mothers and children I sought to represent, to challenge the constitutionality of Article 602 of the Texas Penal Code. I believe that said provision is unconstitutional in that it unfairly discriminates against illegitimates and children of illegitimate mothers. I believe I am entitled to redress of this issue and it is not a frivolous appeal and does present a serious and substantial question for consideration by the United States Supreme Court. I have no other means available to me to present this issue to the Court except through this appeal and I cannot pay the costs or give security for my proposed appeal.

I ask that this Court permit me to proceed forma pauperis because I am unable to give security or pay the costs or expenses of this appeal.

LINDA SHELL.

STATE OF TEXAS,
County of Dallas.

BEFORE ME, J. Richard Eakin, a Notary Public in and for Dallas County, Texas, on this day personally appeared Linda Shell, known to me to be the person whose name is subscribed to the foregoing, and upon her oath swore and stated that the facts set forth in the foregoing Affidavit were all true and correct, and in my presence she swore to and subscribed this Affidavit.

J. RICHARD EAKIN,
Notary Public, Dallas County, Texas.

My commission expires June 1, 1973.

ORDER UPON PLAINTIFFS' APPLICATION TO APPEAL IN FORMA PAUPERIS

[Number and title omitted] (Filed November 30, 1971)

Came forth on the 30th day of November, 1971, the Plaintiff and presented her Application To Appeal this cause in the United States Supreme Court In Forma Pauperis and the Court after having considered her Application and the attached Affidavit hereby granted said Application.

This application and authority to proceed in forma pauperis is granted pursuant to Section 636(b), Title 28, United States Code, and the Northern District of Texas, Misc. Order No. 732, implementing such code provision.

PATRICK H. MULLOY,
United States Magistrate.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

[Number and title omitted] (Filed November 30, 1971)

I.

Notice is hereby given that the Plaintiff, Linda R. S., on behalf of herself, her minor daughter, and on behalf of all other women and minor children similarly situated, hereby appeals

to the Supreme Court of the United States from the Order entered in this action on November 1, 1971.

This appeal is taken pursuant to 28 USC Section 1253.

II.

The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, including in said transcript the following:

(1) Plaintiff's Original Complaint;

(2) Answer of Defendant State of Texas;

(3) Stipulated Statement of Facts;

(4) Affidavits in Support of Stipulated Statement of Facts;

(5) Plaintiff's Affidavit;

(6) Plaintiff's First Amended Complaint;

(7) Defendant's First Amended Answer;

(8) Original Answer of Henry Wade;

(9) Plaintiff's Third Amended Complaint;

(10) Brief of Plaintiff's;

(11) Defendant's Brief;

(12) Memorandum Opinion and Order with Dissenting Opinion;

III.

The following questions are presented by this appeal:

(1) Whether the Plaintiff individually, on behalf of her minor daughter and all other women and children similarly situated has standing to challenge the limited application by Dallas County District Attorney Henry Wade of Article 602 of the Texas Penal Code;

(2) Whether the Texas Discriminatory Exclusion of the Illegitimate child from rights of support violates her United States Constitutional guarantee of equal protection of the laws;

(3) Whether Texas refusal to permit an illegitimate child to initiate an action against her father for support denies her due process of law under the Fourteenth Amendment to the United States Constitution;

(4) Whether the illegitimate's right to support from her natural father is a fundamental right and liberty the deprivation of which violates the protections of the Ninth Amendment of the United States Constitution;

(5) Whether Texas discrimination against an illegitimate child in support matters operates to deny that child's

mother her fundamental rights under the provisions of the Ninth Amendment of the United States Constitution;

(6) Whether Texas denial to the illegitimate child of a right of support from her father constitutes a violation of the mother's due process and equal protection guarantees of the Fourteenth Amendment of the United States Constitution;

(7) Whether the Defendant Henry Wade should be enjoined from excluding illegitimates from the scope of those to be protected by the provisions of Article 602 of the Texas Penal Code;

WINDLE TURLEY,
McKool, McKool, Jones, Shoemaker and Turley.
Attorneys for plaintiffs, 2000 McKool Building, 5025 North Central Expressway, Dallas, Texas 75205.

[Proof of service omitted.]

SUPREME COURT OF THE UNITED STATES

No. 71–6078

LINDA R. S., ET AL., APPELLANTS,

v.

RICHARD D. AND TEXAS, ET AL.

Upon consideration of the motion of the appellants for leave to proceed herein in forma pauperis,

It is ordered by this Court that the said motion be, and it is hereby, granted.

APRIL 17, 1972

SUPREME COURT OF THE UNITED STATES

No. 71–6078

LINDA R. S., ET AL., APPELLANTS,

v.

RICHARD D. AND TEXAS, ET AL.

Appeal from the United States District Court for the Northern District of Texas.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

APRIL 17, 1972

U.S. GOVERNMENT PRINTING OFFICE: 1972

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MICHAEL RODAK, JR., CLERK

No. 71-6078

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

LINDA R. S., ET AL.,

Appellants

v.

STATE OF TEXAS, ET AL.,

Appellees

MOTION TO AFFIRM

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JURIS. STATEMENT NOT PRINTED

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No. 71-6078

IN THE

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OCTOBER TERM 1971

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Appellants

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Appellees

MOTION TO AFFIRM

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Appellees, the State of Texas, Robert Calvert, Chief Justice of the Texas Supreme Court, and Crawford C. Martin, Attorney General of Texas, move that the judgment entered by the Court below be affirmed on the ground that the questions are so unsubstantial as not to warrant further argument.

STATEMENT OF THE CASE

This action is an appeal by the Appellants, Linda R. S., her minor child, and all other mothers and children of the class they allegedly represent from the judgment entered by the Court below on the 1st day

of November, 1971, in a class action commenced by the Appellants against the Appellees, wherein the Appellants sought: (1) a declaratory judgment holding invalid Article 602 of the Texas Penal Code and Article 4.02 of the Texas Family Code, (2) an injunction requiring the State of Texas and its officers to cease certain alleged discriminatory application of Article 602 of the Texas Penal Code and Article 4.02 of the Texas Family Code, and (3) an order requiring Richard D., the alleged father of Linda R. S.'s child to pay child support.

The Appellants in this proceeding are women and minor children who have sought, are seeking, or in the future will seek to obtain support for illegitimate children from the child's father.

The Court below, in its judgment entered on the 1st day of November, 1971, held that the Appellants lacked the proper standing to challenge the validity of Article 602 of the Texas Penal Code and dismissed that portion of the case. As to the remaining portion of Appellants' case, the Court below held that the provisions of Article 4.02 of the Texas Family Code were of such nature as to be improper for consideration by a three-judge federal court and remanded this portion of the proceeding to the judge to whom the application for injunction was originally presented for further proceedings. From the foregoing action of the Court below, the Appellants have brought this appeal.

OPINION BELOW

The opinion of the United States District Court for the Northern District of Texas, Dallas Division, rendered on the 1st day of November, 1971, not yet re-

ported, is attached to Appellants' Jurisdictional Statement as Appendix "A."

STATUTES INVOLVED

Article 4.02 of the Texas Family Code provides that:

> "Each spouse has the duty to support his or her minor children. The husband has the duty to support the wife and the wife has the duty to support the husband when he is unable to support himself. A spouse who fails to discharge the duty of support is liable to any person who provides necessaries to those to whom support is owed."

Article 602 of the Texas Penal Code provides that:

> "Any husband who shall willfully desert, neglect or refuse to provide for the support and maintenance of his wife who may be in necessitous circumstances, or any parent who shall willfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not more than two years."

ARGUMENT

The Appellants in the instant proceeding have brought a class action in behalf of all women and minor children who have sought, are seeking, or in the future will seek to obtain support for illegitimate children from the child's father. The Appellants seek a declaratory judgment that Article 4.02 of the Texas Family Code and Article 602 of the Texas Penal Code are unconstitutional on their face and have been unconstitutionally applied so as to systematically exclude unwed mothers and children of unwed mothers from the benefits of Article 4.02 of the Texas Family

Code and Article 602 of the Texas Penal Code. The Appellants further seek a permanent injunction requiring the State of Texas to cease its discriminatory application of its child support laws and that the Defendant below, Richard D., be required to pay a reasonable amount of money for the support of his illegitimate child whose mother is the Appellant, Linda R. S.

The Appellants have attempted to invoke the jurisdiction of the Court below under the Ninth and Fourteenth Amendments to the United States Constitution; 28 U.S.C. Sections 1331, 1343, 2201, 2202, 2281, and 2284; and 42 U.S.C. Section 1983.

While the Appellants in their Jurisdictional Statement attempt to raise issues before this Court dealing with the merits of their case, the only issues actually before this Court deal with jurisdiction and standing. The Court below reached no decision on the merits of Appellants' argument dealing with the validity of Article 602 of the Texas Penal Code for the reason that the Court felt, and so held, that Appellants lacked the proper standing to challenge the provisions of this statutory enactment. In turn, the issues concerning the validity of Article 4.02 of the Texas Family Code were not decided on the merits but merely remanded to the one-judge court for further proceedings.

In view of the foregoing, Appellees submit that this case is not before this Court on issues dealing with the merits of Appellants' allegations, but merely upon jurisdictional questions.

The Court below held that the Appellants lacked the proper standing to challenge the validity of Article

602 of the Texas Penal Code and dismissed this portion of Appellants' case.

Article 602 of the Texas Penal Code provides that any "husband" who fails to support his wife, or any "parent" who fails to support his "child" is subject to criminal prosecution and punishment. However, the Texas courts have held that only parents of legitimate children may be criminally prosecuted under Article 602 of the Texas Penal Code. *Beaver v. State,* 256 S.W. 929 (Tex.Crim.App. 1923).

As the Appellant, Linda R. S., is the mother of an illegitimate child, she could not be criminally prosecuted for failure to support her child and is in absolutely no danger of being prosecuted for a violation of Article 602 of the Penal Code. As was noted by the Court below, the proper party to challenge the validity or constitutionality of Article 602 of the Texas Penal Code would be a parent of a legitimate child who was being prosecuted pursuant to Article 602. The challenge in such a case would be on the basis that because the parents of illegitimate children may not be prosecuted, the statute unfairly discriminates against the parents of legitimate children.

As to Appellants' challenge to Article 4.02 of the Texas Family Code, the Court below recognized that such challenge was improper to be considered by a three-judge federal court as there were no state officials or officers involved in the operation of Article 4.02. As noted by the Court below, Article 4.02 is enforceable through a civil suit for damages against a defaulting spouse. Consequently, this portion of Appellants' suit is pending before a one-judge federal court.

It might be helpful at this point to note that Appellants are relying upon 28 U.S.C. Sections 1331, 1343, 2201, 2202, 2281, 2284, and 42 U.S.C., Section 1983 to confer jurisdiction upon the federal courts.

A three-judge federal district court is a statutory creature with a limited sphere of operation. It is an extra-ordinary court and technical requirements relating to its jurisdiction are to be strictly construed. *Bailey v. Patterson,* 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed. 2d 512 (1962). Section 2281 of Title 28 of the United States Code sets out the jurisdictional limitations binding on a three-judge court:

(1) an interlocutory or permanent injunction must be sought;

(2) the injunction sought must be one to restrain the action of a state officer or administrative agency;

(3) the action sought to be enjoined must consist of the enforcement or execution of a state statute; and

(4) the injunction must be sought on the ground that the state statute is unconstitutional.

Jehovah's Witnesses in State of Washington v. King County Hospital, 278 F.Supp. 488 (1967).

It is fundamental that the injunctive relief sought must be against a state officer performing a state-wide function for 28 U.S.C., Section 2281 to come into effect. *Moody v. Flowers* 389 U.S. 97, 87 S.Ct. 1544, 18 L.Ed.2d 643 (1967). The case of *Moody v. Flowers, supra,* cited the case of *Wylenz v. Sovereign Camp, W.O.W.,* 306 U.S. 573, 59 S.Ct. 709, 83 L.Ed. 994

(1939), where the court held that in addition to the requirement of a state officer being a party that such state officer must be more than a nominal party, stating:

> "This requirement is one of substance, not of form, and it is not satisfied by joining, as nominal parties Defendant, state officers whose action is not the effective means of enforcement or execution of the challenged statute."

None of the Appellees in this case have any duties in connection with the enforcement of Article 602 of the Texas Penal Code, or Article 4.02 of the Texas Family Code, with the exception of the District Attorney of Dallas County, Texas, a Defendant below, who has the responsibility of prosecuting violations of Article 602 of the Texas Penal Code in Dallas County. However, his responsibilities and functions are not state-wide as required by *Moody v. Flowers, supra.*, but restricted to Dallas County only.

Consequently, the Appellees submit that the Appellants have neither alleged nor proved sufficient grounds to confer jurisdiction upon the Court below pursuant to 28 U.S.C., Section 2281.

As to Appellants' allegations against the State of Texas as an Appellee, *Hans v. Louisiana,* 134 U.S. 1, 10 S.Ct. 504 (1890), and *Georgia Railroad and Banking Co. v. Redwine,* 342 U.S. 299, 72 S.Ct. 321 (1952), specifically provide that a federal court may not entertain an action brought by a citizen of a state against that state, even though such a suit is not expressly barred by the language of the Eleventh Amendment.

Further, *Loux v. Rhay,* 375 F.2d 55 (1967), provides that a civil rights case offers no exception to the rules set out by its statement that:

"Congress has not authorized actions against the States under the Civil Rights Act, Monroe v. Pate, 365 U.S. 167, 187-192, 81 S.Ct. 473, 5 L.Ed. 492; Williford v. People of California, 352 F.2d 474 (9th); Charlton v. City of Hialeah, 188 F.2d 421 (4th) and the Supreme Court has admonished federal courts to scrupulously confine their jurisdiction to the precise limits which the statute has to bind. (Healy v. Ratta, 292 U.S. 263, 270, 54 S.Ct. 700, 703, 78 L.Ed. 1248)."

One test for determining whether the Eleventh Amendment applies to a suit is set out in *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441 (1907), where it is stated that:

". . . Individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the federal Constitution, may be enjoined by a federal court of equity from such action."

Section 1331 of Title 28 of the United States Code is the so-called federal question provision. It gives district courts jurisdiction of cases where the matter in controversy exceeds $10,000.00 and arises under the United States Constitution or a federal statutory enactment. The foregoing provision recognizes certain exceptions to the $10,000.00 jurisdictional amount, but only when such exceptions are spelled out in some other statute. In the instant proceeding the Appellants have completely failed to show that the instant proceeding is some exception to the necessity of alleging and proving the $10,000.00 jurisdictional amount. In the absence of such an exception the complaint must allege

the jurisdictional amount in good faith to give the court jurisdiction under 28 U.S.C., Section 1331. *Congress of Racial Equality v. Clemmons,* 323 F.2d 54 (5th Cir. 1963), cert.den. 375 U.S. 992, 84 S.Ct. 632, 11 L.Ed.2d 478. Of course, in addition to the allegations there must be proof which is completely lacking in this case. In view of the foregoing, the Appellees submit that the Appellants have not complied with the provisions of 28 U.S.C., Section 1331, in such a manner as to confer jurisdiction upon the Court below as they have alleged no exception to or proved the jurisdictional amount.

28 U.S.C., Sections 2201 and 2202, upon which the Appellants also rely for jurisdiction, are the so-called declaratory judgment provisions. These sections do not confer jurisdiction on federal courts, but merely provide an additional remedy once jurisdiction is acquired. *Pierce v. Jordan,* 333 F.2d 951 (9th Cir. 1964); *El Paso Building and Construction Trades Council v. El Paso Chapter Assoc. General Contractors,* 376 F.2d 797 (5th Cir. 1967). In addition federal courts will not undertake to give advisory opinions on state statutes. *Flast v. Cohen,* 392 U.S. 83, 20 L.Ed.2d 947, 88 S.Ct. 1942 (1968); *Audiocasting, Inc. v. State of Louisiana,* 143 F.Supp. 922 (D.C. La. 1956). There must be an actual controversy. *Evers v. Dwyer,* 358 U.S. 202, 79 S.Ct. 178, 3 L.Ed.2d 222 (1958); *Flast v. Cohen, supra.* The Appellees submit that in the instant proceeding the Appellants have failed to allege or show that there is any actual controversy between the Appellants and some officer of the State of Texas or even the State of Texas pertaining to the challenged statutes. The only controversy is between Appellant, Linda R. S. and the father of her child over child sup-

port payments which the federal courts have no jurisdiction to award. Consequently, the instant proceeding amounts to nothing more than the Court being asked to give an advisory opinion as to the constitutionality of certain State statutes. In view of the foregoing, the Appellees submit that the Appellants have failed to show that this Court has jurisdisction of the instant proceeding pursuant to 28 U.S.C., Section 2201 and 2202.

28 U.S.C., Section 1343 confers jurisdiction upon federal district courts in civil rights matters. In the instant proceeding only Section 1343(3) could possibly be applicable. However, Section 1343 does not stand alone to confer jurisdiction on federal courts. *Blaye v. Moore,* 315 F.Supp. 495 (S.D. Tex. 1970); *Lucero v. Donovan,* 258 F.Supp. 979 (C.D. Calif. 1966).

To support the Appellants' contention of jurisdiction pursuant to 28 U.S.C., Section 1343, the Appellants have referred to the provisions of 42 U.S.C., Section 1983. 42 U.S.C., Section 1983 is a civil rights remedy against the action of a person acting under color of State law and confers jurisdiction upon federal district courts. State action is required before this remedy is available and the wrongdoer must be clothed with authority of State law. *United States v. Classic,* 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941). An individual's action may constitute State action where a State officer conspires with an individual to create a wrong. *Dinwiddie v. Brown,* 230 F.2d 465 (5th Cir. 1956). Also an individual's action may constitute State action where such individual is performing a traditional State officer's function and cloaks himself under the authority of such an officer. *Hall v. Garson,* 430 F.2d 430 (5th Cir. 1970). The facts and pleadings

in this case have failed once again to meet these jurisdictional requirements.

28 U.S.C., Sections 2281 and 2284 do not confer jurisdiction on a federal court, but are a limitation upon the court's jurisdiction. Jurisdiction, if it exists at all, must rest upon some other statute. *Smith v. California,* 336 F.2d 530 (9th Cir. 1964).

In view of the foregoing authority, the Appellees submit that the Appellants have wholly failed to allege or prove the necessary grounds for conferring jurisdiction upon the Court below to entertain the instant proceeding, and therefore have failed to state a cause of action upon which relief may be granted.

As to the issue of standing, relied on by the Court below, the following portions of the opinion of this Court in *Flast v. Cohen, supra* readily disclose the correctness of the decision of the Court below that Appellants lacked standing to challenge Article 602 of the Texas Penal Code.

> "... *The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.* The 'gist if the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the out come of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' Baker v. Carr, 369 U.S. 186, 204, 7 L.Ed.2d 663, 82 S.Ct. 691 (1962). In other words, when standing is placed in issue in a case, *the question is whether the person whose standing is challenged is a proper party to request an adjudication of a*

particular issue and not whether the issue itself is justiciable. . . ." (Emphasis added).

In the instant case, the Appellants have no "personal stake" in whether a criminal statute is declared unconstitutional because they are not and cannot be prosecuted pursuant to this statute. In addition, the validity or invalidity of the statute will have no bearing on whether support from the illegitimate child's father is forthcoming. The validity of Article 602 of the Texas Penal Code is justiciable, but not by these Appellants in the way sought.

CONCLUSION

The Appellees submit that the Appellants have neither plead, and certainly not proved, the necessary elements to confer jurisdiction upon the Court below, and the judgment entered on November 1, 1971, by the United States District Court for the Northern District of Texas, Dallas Division, should be affirmed.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant

ALFRED WALKER
Executive Assistant

J. C. DAVIS
Assistant Attorney General

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Assistant Attorney General
Box 12548, Capitol Station
Austin, Texas 78711

Attorneys for Appellees

CERTIFICATE OF SERVICE

I, Pat Bailey, one of the attorneys for the Appellees and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of March, 1972, I served a copy of the foregoing Motion to Affirm on the Appellants by depositing a copy in the United States mail, postage prepaid, and addressed to the attorney of record for Appellants as follows: Mr. Windle Turley, 2000 McKool Building, 5025 North Central Expressway, Dallas, Texas.

PAT BAILEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6078

LINDA R. S., *et al.*,

Appellants,

v.

RICHARD D. and TEXAS, *et al.*,

Appellees.

APPEAL FROM A THREE JUDGE
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF TEXAS

APPELLANTS' BRIEF

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Appellees.

APPEAL FROM A THREE JUDGE
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF TEXAS

APPELLANTS' BRIEF

OPINION BELOW

The Opinion of the Three Judge District Court for the Northern District of Texas, holding that Appellants attack on Article 602 of the Texas Penal Code was properly before the Three Judge Court, but that Appel-

lants had no standing to challenge, and remanding the challenge of Article 4.02 of the Texas Family Code back to a single District Judge, is reported at 335 F. Supp. 804 (N.Tex., 1971). The District Court's dismissal of Appellants' challenge of Article 4.02 of the Texas Family Code has not been reported.

JURISDICTION

This suit is brought under 28 U.S.C. Sec. 2281, providing for a direct appeal to the Supreme Court of the United States from the decision of a Three Judge United States District Court granting or denying an interlocutory or permanent injunction in a civil suit required to be heard by a Three Judge Court. The Judgment of the Three Judge Court was entered on November 1, 1971, Notice of Appeal was filed in that Court on November 30, 1971, and this Court noted probable jurisdiction on April 17, 1972. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the Judgment on direct appeal in this case: *Anderson v. Martin*, 375 U.S. 399 (1964); *U.S. v. Georgia Public Service Commission*, 371 U.S. 285 (1963); *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960) and *Radio Corp. of America v. U.S.* 95 F. Supp. 660, affirmed 341 U.S. 412 (1951).

QUESTIONS PRESENTED

1. Whether Linda R.S., her minor child, and the class they represent are being injured as a result of the unconstitutional application of Article 602, Texas Penal Code, by the District Attorney and thus have standing

because their economic and social damages are within the zone of interest protected by that statute.

2. Whether Texas' unreasonable discriminatory exclusion of the illegitimate child from rights of support from her father violates her United States Constitutional guarantee of equal protection of the laws.

3. Whether Texas' refusal to permit an illegitimate child to complain against her father for failure to provide support denies her due process of law under the Fourteenth Amendment to the United States Constitution.

4. Whether the illegitimate's right of support from her natural father is a fundamental right and liberty, the unreasonable deprivation of which violates the protections of the Ninth Amendment of the United States Constitution.

5. Whether Texas' discrimination against an illegitimate child in support matters operates to deny that child's mother her fundamental rights under the provisions of the Ninth Amendment of the United States Constitution.

6. Whether Texas' denial to the illegitimate child a right of support from her father constitutes a violation of the mother's due process and equal protection guarantees of the Fourteenth Amendment of the United States Constitution.

7. Whether the State of Texas acting through the Dallas County District Attorney, Henry Wade, should be enjoined from continuing to exclude children of unwed parents from the scope of those protected by the provisions of Article 602 of the Texas Penal Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Ninth Amendment, United States Constitution.

Fourteenth Amendment, United States Constitution.

Article 602 of the Texas Penal Code, Vernon's Annotated Texas Statutes;

"Any husband who shall willfully desert, neglect or refuse to provide for the support and maintenance of his wife who may be in necessitous circumstances, *or any parent who shall willfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor*, and upon conviction, shall be punished by confinement in the County Jail for not more than two years." (emphasis added)

Article 4.02 of the Texas Family Code, Vernon's Annotated Texas Statutes;

"Each spouse has the duty to support his or her minor children. The husband has the duty to support the wife and the wife has the duty to support the husband when he is unable to support himself. A spouse who fails to discharge the duty of support is liable to any person who provides necessaries to those to whom support is owed." (emphasis added)

STATEMENT

On October 3, 1970, Appellant, Linda R. S., gave birth to a baby girl. The baby's mother was not and has never been married to the child's father, Richard D., but she did cohabit with him for a period of several months in

1969 and 1970 during which time she became pregnant by him. Richard D., who was a named Defendant in the lower Court, refused to marry the Appellant or to support his child. (App. 13-14)

On December 3, 1970, Appellant initiated a class action in the United States District Court for The Northern District of Texas, requesting a Three Judge Court be convened to hear her case. Appellant's class action complained of invidious discrimination by the State of Texas, against her child, herself and other unwed mothers and children similarly situated, as a result of the state's refusal to permit an illegitimate child to seek support from its father while the state at the same time afforded such privilege to children of wed parents. (App. 4)

On May 24, 1971, the Appellant confirmed that the Dallas District Attorney would not entertain, on behalf of her child, her complaint against Richard D., for his failure to provide support for his child as required under Article 602 of the Texas Penal Code. (App. 54) Appellant also complained to the Three Judge Court of the unconstitutional exclusion of children of unwed mothers from support benefits afforded under Article 4.02 of the Texas Family Code. (App. 51) This civil provision bestows a right of support to minor children of each "spouse," but is silent as to any such comparable right to children of unwed parents.

Appellant, on behalf of her minor child, individually and on behalf of all Texas mothers and children similarly situated, asked the Three Judge Court to issue a mandatory injunction against Dallas District Attorney, Henry Wade, and the State of Texas to cease their wrongful *EXCLUSION* of illegitimates from the benefits

of Article 602 of the Texas Penal Code and Article 4.02 of the Texas Family Code. (App. 55)

The Three Judge District Court was duly convened, and after receiving written briefs and hearing oral argument issued its Opinion and Order on November 1, 1971. (App. 59)

The Three Judge Court unanimously agreed that the Court was properly convened to hear Appellants' challenge to the constitutionality of Article 602, and agreed that the challenge to Article 4.02 should be remanded to be heard by a single District Judge. (App. 59-60)

On the question of standing, the Three Judges ruled in a 2 to 1 decision that the Appellant had no standing to challenge the constitutionality of Article 602. (App. 60) The Appellant believes the dissenting Judges' Opinion was correct in holding that the Appellant and her minor child were within the "zone of interest to be protected" by Article 602 and that their exclusion creates an "injury in fact, economic or otherwise," such that "a person for whom the statute was designed to protect would have standing to bring a suit to enjoin an alleged violation of that statute." (App. 62)

It is from the majority Opinion of the Three Judge Court that the Appellants appealed directly to the United States Supreme Court. (App. 73)

SUMMARY OF ARGUMENT

1. **That Texas discriminates between the legitimate and illegitimate child with respect to enforcing child support rights is undisputed.** While a child born in wedlock or subsequently adopted thereto is granted full rights of support and maintenance from its father, the Courts and legislatures of Texas have consistently refused

to recognize a comparable duty upon the illegitimate's father either at common law, or under the civil or penal codes. *Home of the Holy Infancy v. Kaska*, 397 S.W.2d 208, 210 (Tex. Sup. Ct., 1966); *Beaver v. State*, 256 S.W. 929 (Tex. Crim. App., 1923).

2. **The magnitude of illegitimacy in Texas, the serious socio-economic consequences, and the nature of the civil rights involved raise a substantial question to which this Court should speak.** There were 19,466 *reported* illegitimate births in Texas in 1969, representing 8.8% of the total live births.[1] The City of Dallas, Texas alone reported 3,428 illegitimate births in 1969 which was 14.2% of all live births in the city that year.[2] Nationally one in seven births are illegitimate and in many urban areas the incidence of illegitimacy has more than doubled in the past ten years.[3]

The abundant evidence of social, economic and psychological trauma resulting from the illegitimate's second class citizenry has been concisely stated;

> "To be fatherless is hard enough, but to be fatherless with the stigma of an illegitimate birth is a psychic catastrophe."[4]

While the state's refusal to enforce child support for the illegitimate is obviously not the only factor in such serious socio-economic consequences, it is the *major*

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[1]Texas Department of Health, Vital Statistics, 1969

[2]Texas, City of Dallas, Department of Vital Statistics, 1969

[3]U.S. Health, Education & Welfare Department, National Center for Health Statistics, April, 1970, and Sauber Rubenstein, *Experiences of the Unwed Mother As Parent*, Community Journal of Greater New York, 1965, p 1

[4]Fodor, "Emotional Trauma Resulting From Illegitimate Birth" 54 Archives of Neurology in Psychiatry, (1945) p. 31

source of economic deprivation and as such perhaps the largest contributor to the bastard-stigma.

3. Linda R. S. and her minor child, and the class they represent, have standing to challenge Texas' unconstitutional application of Article 602 of the Penal Code. The majority Opinion of the Three Judge District Court erred when it failed to consider, even indirectly, the Supreme Court's recent criteria for standing to sue. In this instance the challenged penal statute was enacted for the welfare and protection of minor children, and a criminal penalty attached for breach of that statute. The minor child is the direct and only economic recipient of the enforcement of Article 602 and therefore, being well within the "zone of interest" and purpose of the Article, the Appellants have a constitutional right to have the Article enforced for their benefit just as it is enforced for the benefit of any other child. The deprivation of that benefit creates a serious economic and social injury, which is a direct result of an unconstitutional application of the state statute by the Dallas County District Attorney.

There is "such a personal stake in the outcome of the controversy as to assure . . . concrete adversariness . . ." *Baker v. Carr*, 369 U.S. 186, 204 (1962). Not only do Appellants have a personal stake in the outcome of this controversy, but the question of the constitutionality of the District Attorney's acts supplies the logical nexus; *Flast v. Cohen*, 392 U.S. 83, at 102 (1968), and brings the unwed mother and her minor child well "within the zone of interest to be protected or regulated by the statute." *Data Processing Service Organization v. Camp*, 397 U.S. 150, at 153 (1970) Even an illegitimate has a right to expect a law that is enacted for the benefit of "children" to be enforced for his benefit in the absence of any rational basis for discrimination. He thus has

standing in this case to challenge the unequal protection of the laws to which he is subjected by the Dallas County District Attorney.

4. The Appellants' unequal treatment constitutes invidious discrimination clearly prohibited by the Fourteenth and Ninth Amendments to the United States Constitution. The Supreme Court in *Levy vs. Louisiana*, 391 U.S. 68 (1968), set forth the inequity as well as the illegality of a state's unreasonable discrimination against an illegitimate child. In *Levy*, the United States Supreme Court struck down Louisiana's discrimination against a minor illegitimate finding such treatment to constitute "invidious discrimination when no conduct on the part of the child was relevant to the discrimination practiced against him," at page 72.

The minor illegitimate in the State of Texas, when seeking equal protection of the laws in support matters, is confronted with an insurmountable barrier. He is blocked by the common law, Article 4.02 of the Texas Family Code, the Court's interpretation of Article 602 of the Texas Penal Code, and a legislature consistently unwilling to respond to his plight.

No reasonable and compelling state interest exists to justify the continued discrimination against this minor child, particularly when such unequal protection of the law is balanced against the resulting serious socio-economic detriment to Appellants.

The state enforces a bastard-stigma which not only deprives children of unwed parents their fair economic support, but encourages a socio-economic condition which is extremely detrimental to the emotional well being of such children.

Texas' refusal to permit its illegitimate children to obtain the same monetary benefits it affords legitimate children, in effect, denies children of unwed parents due process of law under the Fourteenth Amendment to the United States Constitution. *Shapiro vs. Thompson*, 394 U.S. 618 (1969)

The state punishes the child of unwed parents, by penalizing him for circumstances he did not voluntarily enter, and from which he cannot voluntarily escape. Such punishment is "cruel and unusual" under the Eighth and Fourteenth Amendments *Robinson vs. California*, 370 U.S. 660 (1962)

The legislature and Courts of the State of Texas shield the unwed father, and punish the child for the parents' "non-social" behavior. *Smith vs. King*, 392 U.S. 309, 336 n5 (1968) What should be recognized as a basic and fundamental right in *every* child, the right to receive the support and maintenance of its father, is blocked, by the State of Texas, and as such, there occurs a denial to both the unwed mother and the minor child, of the guarantees of the Ninth Amendment.

Texas' laws and practices stand as an insurmountable barrier to prevent the unwed mother from receiving any support or maintneance from the natural father of her child. This practice results in a type of economic coercion which can, and presumably in many instances does, compel the unwed mother to seek an abortion, or place her child for adoption, either of which alternative, she might otherwise not choose. Such infringement upon a mother's right to *freely* elect to keep her child not only invades the guarantees of the Ninth Amendment of the United States Constitution but is contrary to the concepts discussed in *Skinner v. Oklahoma*, 316 U.S. 535, at 541 (1942); *Griswold v. Connecticut*, 381 U.S. 479, at

492 (1965) and *Loving v. Virginia*, 388 U.S. 1 (1967).

5. The Court should issue a mandatory injunction to prevent the Dallas County District Attorney from continuing to discriminatorily exclude children of unwed parents from Texas Child Support Laws.

ARGUMENT

TEXAS STATUTES AND DECISIONS

In Texas "a father is not under a common law or statutory duty to support his illegitimate," *Home of the Holy Infancy v. Kaska*, 397 S.W.2d 208 at 210 (Tex. Sup. Ct., 1966); while a legitimate child, that is, one born in wedlock or subsequently adopted thereto, is granted a full umbrella of statutory and common law support provisions both of a penal and civil nature.

> "... any parent who shall willfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under 18 years of age, shall be guilty of a misdemeanor, ..." Article 602 of the Texas Penal Code, Vernon's Texas Penal Code, Annotated

The Courts of this State have consistently interpreted the words "child or children" in the above penal provision to mean legitimate children and have thus excluded the illegitimates from the benefit of protection under Article 602 of the Texas Penal Code. *Beaver v. State*, 256, S.W. 929 (Tex. Crim. App., 1923)

As recently as 1969 the Texas legislature has had an opportunity to impose child support duties upon an illegitimate's father but again elected not to do so when it enacted Article 4.02 of the new Texas Family Code

which became effective January 1, 1970. That statutory provision on its face excludes from the children of unwed parents the benefit of support.

> *"Each spouse has the duty to support his or her minor children.* The husband has the duty to support his wife, and the wife has the duty to support the husband when he is unable to support himself. A spouse who fails to discharge a duty of support is liable to any person who provides necessities to those to whom support is owed." Article 4.02, Texas Family Code, Vernon's Texas Civil Statutes (emphasis added)

The laws of the State of Texas thus provide both civil and criminal remedies to assist the legitimate child in securing a measure of support from his father; while the Penal Code, the Family Code, and the decisions of the highest Courts of Texas have systematically excluded illegitimate children from the privileges and protections of these laws.

THE MAGNITUDE OF ILLEGITIMACY AND THE NATURE OF THE CIVIL RIGHTS INVOLVED RAISE A QUESTION OF SUBSTANTIAL PUBLIC CONCERN

Although no one knows for certain how many illegitimate children are born in Texas every year, because social stigma often drives a mother to concealment and subterfuges, it is known that there were 19,466 illegitimate births *reported* in this state in 1969, which figure represents 8.8% of the total live births.[5]

One in seven are born illegitimate in the United States today,[6] resulting in more than 300,000 illegitimate births

[5]Texas Department of Health, Vital Statistics, 1969

[6]U.S. Health, Education & Welfare Department, National Center for Health Statistics, April, 1970

per year nationally on a trend which will result in more than 400,000 illegitimate births per year in this country by 1980.[7] The rates of national illegitimacy have more than tripled since 1940.[8] In the City of Dallas, Texas, 3,428 illegitimate births were reported in 1969, representing 14.2% of all live births in that city in the same year.[9] In many urban areas of this country the incidents of illegitimacy has more than doubled in the past ten years.[10]

In sheer numbers, and without consideration of the socio-economic implications, which are discussed later in this brief, the problem of ascertaining and securing the civil rights of the illegitimate in Texas is of substantial and compelling magnitude. Not only are literally thousands of illegitimates in this state already confronted with the need to have their civil liberties determined in this area, but thousands more are born every year as both the rate and number of illegitimates increase.

There is sufficient and compelling public interest in the subject matter of this case, such that the Court should now address itself to the question of the systematic but clear discrimination enforced by the laws of this state to prevent this illegitimate child and others similarly situated from receiving the support of their fathers.

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[7]F.J. Fentura, "Recent Trends & Differentials in Illegitimacy" *Journal of Marriage & Family* (August, 1969), p. 466

[8]U.S. Department of Commerce, *Statistical Abstract of United States*, 1967, p 51

[9]Texas, City of Dallas, Department of Vital Statistics, 1969

[10]Sauber and Rubenstein, *Experience of the Unwed Mother As Parent*, Community Council of Greater New York, 1965, p. 1

I.

Appellants and the Class They Represent Have Standing in This Case Because They Are Being Injured as a Direct Result of the Unconstitutional Application of a Statute Written for Their Protection and Their Economic and Social Damages Are Sufficient to Assure Concrete Adverseness of This Case.

The Minor Appellant and her mother not only have met, but exceed the standing to sue criteria set forth by the United States Supreme Court in recent decisions. Standing is no longer reviewed in the light of some "abstract" procedural rule but rather in the context of the particular facts and questions presented in each case consistent with the Court's historical guidelines. In that respect Linda R. S., an unwed mother, individually and on behalf of other unwed mothers and illegitimate children similarly situated in the State of Texas contend that Article 602 of the Texas Penal Code, as applied, denies them equal protection of the laws and due process of the law and is unconstitutional and invidious discrimination under the Ninth and Fourteenth Amendments to the United States Constitution. Article 602 in its simplest terms provides:

> "... any parent who shall willfully ... refuse to provide for the support ... of his ... children ... shall be guilty of a misdemeanor, ..."[11]

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[11]Article 602, Texas Penal Code, Vernon's Texas Penal Code Annotated:

"Any husband who shall willfully desert, neglect or refuse to provide for the support and maintenance of his wife who may be in necessitous circumstances, or any parent who shall willfully desert, neglect or refuse to provide for the support

When Richard D. failed to support his child, the child's mother made application to the Dallas District Attorney's Office to prosecute him pursuant to Article 602. The District Attorney's Office refused her application because she was not married to Richard. (App. 54)

While such refusal is consistent with Texas Courts' position that "child or children" does not include illegitimate children, *Beaver v. State*, 256 S.W. 929 (Tex. Crim. App., 1923), such position is nonetheless invidious discrimination and an unconstitutional application of the statute.

The legislature of the State of Texas by enacting Article 602 undisputedly intended to protect children from fathers who desert, neglect or refuse to support them. The legislature's concern for these children was so great that it attached a criminal penalty for a parent's violation of the statute.

Article 602 places a duty of support and maintenance upon "any parent" and makes no distinction as to whether that parent is a father or a mother, or whether the parent is single, married, separated or divorced.

An application of the Supreme Court's standing criteria indicates that both the minor illegitimate child and her unwed mother are within the class of persons having standing to challenge the unconstitutional application by the Dallas County District Attorney of Article 602 of the Texas Penal Code.

While previous to *Baker v. Carr*, 369 U.S. 186, 204 (1962), and *Flast v. Cohen*, 392 U.S. 83 (1968), the test of standing may have been a "recognized legal interest,"

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and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not more than two years."

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the United States Supreme Court has since 1962 outlined in more specific terms the criteria which must be met before a litigant has "standing" to qualify as a case and controversy under Article III of the United States Constitution.

In *Baker v. Carr*, supra, at 204 the Court set out "the gist of the question of standing";

> "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions?"

The *Baker* Court then proceeded at page 208, to clearly distinguish between voters having standing to challenge a statute and those who had no such standing. Speaking of the Appellants in the *Baker* case the Court said:

> "They are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes,' *Coleman v. Miller*, 307 U.S., at 438."

and of those without standing,

> "and not merely a claim of 'the right, possessed by every citizen, to require that the government be administered according to law . . .' *Fairchild vs. Hughes*, 258 U.S. 126, 129."

The Supreme Court thus in 1962 held that "voters who alleged facts showing disadvantage to themselves as individuals have standing to sue." *Baker vs. Carr*, supra, at 206.

The following year the Supreme Court held that "school children and their parents who are directly affected by the laws and practices against which their complaints are directed . . ." have an interest sufficient

to give the parties standing to complain. *School District of Abington vs. Schempp*, 374 U.S. 203, at 224, n9 (1963)

In 1968 the United States Supreme Court considered three significant standing cases. These three cases, a competitor case, a taxpayer case and a union member case, all discussed standing issues which the mother and child in this instance clearly meet.

In *Hardin vs. Kentucky Utilities*, 390 U.S. 1, 6 (1968), the Court held that where a litigant, an independent power company, was within the class of persons for whom the statute was designed to protect, they would have standing even though the statute was a limitation upon an activity of another party, in this instance the T.V.A. The Court noted at page 7;

> "Since respondent *is thus in the class which Sec. 15d" (the disputed statute) "is designed to protect* it has standing under familiar judicial principles to bring this suit, . . . and no explicit statutory provision is necessary to confer standing." (emphasis added)

In *Flast vs. Cohen*, 392 U.S. 83 (1968), the Court addressed itself at length to the standing issue in a federal taxpayer's suit, In *Flast vs. Cohen*, Appellant attached the Federal Education Act as unconstitutional because of its aid to religious schools. The Court reviewed the history of the justiciability doctrine and noted at page 97;

> "The many subtle pressures which cause policy considerations to blend into the constitutional limitations of Article III make the justiciability doctrine one of uncertain and shifting contours."

While firm and abstract rules on standing are difficult to come by, the Court in *Flast* nonetheless set forth definite standing principles, all of which the Appellants in this case meet or exceed. the POSTURE of the complaining party himself with respect to the issue, as opposed to the issue itself is fundamental. *Flast vs. Cohen*, supra, at 99. In *Flast* the court noted the importance of standing as it relates to the "concrete adverseness' discussed in *Baker vs. Carr*, 369 U.S. 186, 204 (1962), and added;

> "It is for that reason that the emphasis in a standing problem is on whether the party invoking federal court jurisdiction has 'a personal stake in the outcome of the controversy,' *Baker v. Carr*, supra, at 204, and whether the dispute touches upon 'the legal relations of parties having adverse legal interests,' *Aetna Life Ins. Co. vs. Haworth*, 300 U.S. 227, at 240-21 (1937), page 101."
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> "... It is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." ... "For example the standing requirements will vary ..." page 102

The Flast vs. Cohen Court concluded that even a federal taxpayer making a serious constitutional challenge to a significant federal expenditure has a sufficient economic injury to give him "standing."

Later in 1968, in *Jenkins vs. McKeithen*, 395 U.S. 411 (1969), the Supreme Court found that a labor union member had sufficient standing to challenge an administrative procedure which could potentially raise a criminal complaint against him, even though one apparently was not then filed, and the Court recon-

firmed the *Baker vs. Carr*, supra, and *Flast vs Cohen*, supra, standing concepts that the litigant must have a personal stake so as to assure concrete adverseness and, in addition, that there must be a connection between the "official action challenged, and some legally protected interest of the party challenging that action." *Jenkins vs. McKeithen*, supra, at 423.

The Appellant mother and her child together with the class they represent certainly meet all of the concepts of standing as dicussed by the Supreme Court during the past several years, including the most recent "zone of interest" described in *Data Processing Service Organization vs. Camp*, 397 U.S. 150 (1970). In that competitor's suit the Appellant sought to challenge a regulation issued by the United States Comptroller and directed to federal banks.

In that case an outsider challenged the statutory regulation between a governmental agency and the regulated party, which posture of the parties is not significantly different from that of the parties herein. The Court noted in *Data Processing Service Organization vs. Camp*, supra, at page 153;

> "The legal interest test goes to the merits. The question of standing is different. It concerns, apart from the 'case' and 'controversy' test, the question of whether the interest sought to be protected by the complainant is arguably *within the zone of interest to be protected or regulated by the statute* or constitutional guarantee in question." emphasis added

And the Court continued at page 154;

> "Certainly he who is 'likely to be financially injured, *FCC vs. Sanders Bros. Radio Station*,, 309 U.S. 470,

477, may be a reliable private attorney general to litigate the issues of the public interest in the present case."

Other "outsider" cases have followed the "zone of interest" test discussed in *Data Processing Service Organization vs. Camp*, supra; see *Arnold Tours vs. Camp*, 400 U.S. 45 (1970); *Investment Company Institute vs. Camp*, 401 U.S. 617 (1971); see also *Barlow vs. Collins*, 397 U.S. 159 (1970).

In final analysis, it is a reasonable presumption that if the District Attorney of Dallas County would enforce Article 602 against the parents of illegitimate children, those parents would contribute to the support and maintenance of their children rather than face the possible consequence of jail. Clearly, because the State of Texas through its District Attorney will not enforce the language of this statute against fathers of illegitimate children those children are not receiving economic benefits which they would otherwise receive. In addition, the child's mother, because she alone contributes to the support of the child, and thus, personally meets the requirements of the law that *every parent support* their child, complains of unequal protection when the District Attorney refuses to require the child's natural father to bear a comparable responsibility.

The intent of the statute is clear. It was designed to assure the welfare of children under eighteen years of age. While the state may suffer indirectly by the District Attorney's failure to enforce such statute against all parents equally, the minor child and her mother suffer a direct and significant economic injury.

Certainly the Appellants have a sufficient "stake to assure concrete adverseness" as required by *Baker vs.*

Carr, 369 U.S. 186 (1962); there can be no question but that the Appellants are "persons within the class to be protected by the statute," *Hardin vs. Kentucky Utilities Co.*, 395 U.S. 411 (1968); and when the *Flast vs. Cohen*, 392 U.S. 83 (1969), standing test focuses upon the Appellants personally as against the issues, it is apparent that a sufficient legal nexus exists between the Appellants and the Dallas County District Attorney, such that Linda R. S. and her child are not mere bystanders to the action; and finally, the minor child and her mother are without question within the "zone of interest to be protected" as discussed in *Data Processing Service Organization vs. Camp*, supra.

The United States Supreme Court has during the past ten years stated that statutory regulations flowing between a federal bank and the United States Comptroller can be challenged by an outside competitor;[12] that a statute written by the legislature to regulate candidates can be challenged by a voter;[13] that administrative procedures to regulate a union can be challenged by an independent union member,[14] and that a statute providing United States aid to religious schools can be challenged by an independent taxpayer;[15] there should be no question but that a minor child and her mother, whose welfare a statute was designed to protect, and who are the direct and only economic recipients of the enforcement of such statute, certainly have standing to challenge an action of the part of a state agency which

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[12]Data Processing Service Organization vs. Camp, 397 U.S. 150 (1970)
Arnold Tours vs. Camp, 400 U.S. 45 (1970)
Investment Company Institute vs. Camp, 401 U.S. 617 (1971)
[13]Baker vs. Carr, 369 U.S. 186 (1962)
[14]Jenkins vs. McKeithen, 395 U.S. 411 (1969)
[15]Flast vs. Cohen, 392 U.S. 83 (1968)

unconstitutionally denies them the benefits of such law.

II.

Texas Discriminatory Exclusion of This Illegitimate from Rights of Support Violates Her U.S. Constitutional Guarantee of Equal Protection of the Laws

No state shall ". . . deny to any person within its jurisdiction the equal protection of the laws." AMENDMENT FOURTEEN, Section I, United States Constitution.

A search of probable sources indicates that it was not until 1968 that a Court in this country for the first time considered in equal protection terms the validity of discrimination against illegitimates. See 65 Mich. Rev. 477 at 483, Equal Protection for the Illegitimate.

A constitutional denial of equal protection of the laws in this case is evident when read in the light of the United States Supreme Court's landmark decision in *Levy vs. Louisiana*, 391 U.S. 68 (1968), wherein Justice William Douglas stated on page 70;

> "We start from the premises that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Fourteenth Amendment."

The particular issue before the Court in *Levy vs. Louisiana*, supra, dealt with the mother-child relationship and specifically with whether an illegitimate could be discriminatorily excluded from the benefits of a state's wrongful death statute. In that decision the Court noted that a state has broad powers when it comes to making classifications but was quick to point out that,

". . . it may not draw a line which constitutes an invidious discrimination against a particular class." Justice Douglas noted the Courts have ". . . been extremely sensitive when it comes to basic civil rights, . . . and have not hesitated to strike down an invidious classification even though it had history and tradition on its side." p. 71

The Supreme Court pointed out the inequity as well as the illegality of discriminating against the illegitimate in noting in *Levy vs. Louisiana*, supra, that:

"He certainly is subject to all the responsibilities of a citizen, including payment of taxes and conscription under the Selective Service Act. How under our constitutional regime can he be denied correlative rights which other citizens enjoy . . ." p. 71

". . . we conclude that it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother." p. 72

Although the Supreme Court in the above case was dealing with the mother-child relationship, an examination of the theory and specific language supporting that decision compels us to conclude that no different result should obtain in considering the father-child relationship. Indeed the Supreme Court's intent to apply the equal protection clause beyond the mother-child illegitimate relationship was indicated, when in a concurring opinion later in the same year it was observed:

"The other day in a comparable situation *we held that the equal protection clause of the Fourteenth Amendment barred discrimination against illegitimate children.* We held that they cannot be denied a cause of action because they were conceived in 'sin', that the making of such a disqualification was

an invidious discrimination. *Levy v. Louisiana,* 391 U.S. 68." *Smith v. King*, 392 U.S. 309, 336 (1968) emphasis added, J. Douglas concurring opinion.

Dandridge vs. Williams, 397 U.S. 471, 523 (1970), a welfare case from the State of Maryland, also indicated the Court intended a broad application of the equal rights protection of illegitimates when J. Marshall noted that the case before the Supreme Court in that instance "... bears some resemblance to the classification between legitimate and illegitimate children which we condemned as a violation of the equal protection clause in *Levy vs. Louisiana*, 391 U.S. 68 (1968)."

A score of law reviews and journals have interpreted the Supreme Court's action in *Levy vs. Louisiana*, supra, to mean "... the equal protection clause will protect a bastard even against distinctions and classifications that have deep roots and can be readily rationalized." 82 Harv. L. Rev. 63, 293-4 (1968), see also 36 U. Chi. L. Rev. 338, 338 (1968) Off-spring of *Levy vs. Louisiana*, Krause.

At least one State Court has considered the father-child relationship and specifically the right of the illegitimate to receive support from his father. The Missouri Supreme Court unanimously concluded in R__ vs. R__, 431 S.W.2d 152, 154 (Mo., 1968);

"... the principles applied by the U.S. Supreme Court would render invalid state action which produces discrimination between legitimate and illegitimate children insofar as the right to compel support by his father is concerned ...

"The decisions of the U.S. Supreme Court compel the conclusion that the proper construction of our statutory provisions relating to the obligations and

rights of the parents . . . affords illegitimate children a right equal to that of legitimate children to require support by their fathers."

At least three United States Fifth Circuit Courts have noted the strong implications of *Levy vs. Louisiana*, supra. *Murphy vs. Houma Well Service*, 413 F.2d 509 (5th Cir., 1969), wherein the Court refused to override the presumption of legitimacy in a wedlock birth and noted that the discrimination against an illegitimate in a mother-child relationship was unalwful as expressed in *Levy vs. Louisiana*, supra. *Herbert vs. Petroleum Pine Inspectors*, 396 F.2d 237 (1968) relied upon the *Levy* decision to summarily strike down discrimination against illegitimates under the Jones Act. The Court in *Jefferson vs. Hackney*, 304 F. Supp. 1332, 1341 (N.D. Tex., 1969), noted *Levy vs. Louisiana*, supra, dealt with a basic civil right in forbidding illegitimacy discrimination in the mother-child context.

Equal Protection Test

It is not disputed that a state has a broad power to establish certain social classifications, but at the same time "it may not draw a line which constitutes invidious discrimination against a particular class" *Levy vs. Louisiana*, 391 U.S. 68, at page 71 (1968); *Skinner vs. State of Oklahoma*, 316 U.S. 535, 541-542 (1942). Justice Douglas noted in *Levy v. Louisiana*, supra, p. 71, that "though the test has been variously stated, the end result is whether the line drawn is a rational one. *Morey vs. Doud*, 354 U.S. 457, 465-466 (1957)."

The "rational basis" test when applied by the Supreme Court in another illegitimate case, *Labine vs. Vincent*, 401 U.S. 532 (1971), resulted in a finding that Louisiana intestate succession statute had a rational basis with respect to the state's interest in the disposition of property left within the state.

In determining whether the State of Texas' discrimination of the illegitimate with respect to child support matters has a "rational basis," it is necessary for the Court to determine both the nature of the civil right infringed, and whether there is a corresponding and overriding state interest to justify such discrimination. *Bates vs. Little Rock*, 361 U.S. 516, 524 (1960).

Levy vs. Louisiana, 391 U.S. 68, at 71 (1968) follows a well recognized and long established principle in this nation, that matters of life and birth and marriage and family are basic liberties requiring strong and compelling justification for any encroachment. *Skinner vs. Oklahoma*, 316 U.S. 535 (1942); *Griswold vs. Connecticut*, 381 U.S. 479 (1965); *Harper vs. Virginia Board of Elections*, 383 U.S. 663 (1966).

Having thus established that the illegitimate child is a person and subject to the benefits of the Equal Protection of the Laws Amendment to the United States Constitution, and having further established that discrimination of an illegitimate involves "basic civil rights," "the burden is on the Appellee (State) to demonstrate to the satisfaction of the Court that such infringement is necessary to support a compelling state interest." *Bates vs. Little Rock*, 361 U.S. 516, 524 (1960); *Griswold vs. Connecticut*, 381 U.S. 479 (1965) and *Kramer vs. Union Free School*, 395 U.S. 621 (1969). The Supreme Court in *Harper vs. Virginia Board of Elections*, 383 U.S. 663 (1966), has said;

"In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalog of what was at a given time deemed to be the limits of fundamental rights . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change . . . We have long been mindful that *where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or constrain them must be closely scrutinized and carefully confined.*" (emphasis added)

If, as was suggested in *Yick Wo vs. Hopkins*, 118 U.S. 356 (1886), "equal protection of the laws is a pledge of the protection of equal laws", where is the equal law for legitimate and illegitimate in the State of Texas and what can be said as to justify such classification which infringes upon basic civil rights in such a way that results, as we will see, in an economic injury and "stigmatic-catastrophe." If the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution is to operate effectively it should serve as a constitutional barrier against legislative motives of hate, prejudice, hostility, etc. or alternatively, favoritism and partiality. Special benefits resulting from state legislation must be justified, either by elimination of some evil or achievement of some good. See 65 Mich. L. Rev. 477, Equal Protection for the Illegitimate, Krause (1967). It is submitted that an examination of the illegitimate in historical prospective reveals that the Texas legislation was probably motivated both by prejudice and hostility toward the illegitimate as well as favoritism and partiality of the legitimate.

"As a result of the churches' hatred of extra-marital relations, the usual legal attitude of Laissez Faire toward bastards gave way in the middle ages to a treatment of

them which deprived them of the ordinary rights of man . . . Some law books treated them as almost rightless beings, on a par with robbers and thieves . . . The medieval church, in both its concern for the family and its aversion to illicit sex, re-enforced the basic self-interest of the father."[16] Thus the law of early England, much of it evolving from the medieval church imposed a stigma upon the bastard, the impact of which has been slow to fade, and in many instances is very much alive today.

Although as early as Blackstone's time, I Blackstone, Commentaries 454-60, the illegitimate had a right of support from his father, Texas remains as " . . . one of three states in the United States that has no form of statute requiring a father to support his illegitimate children; in point of fact, we are one of the few jurisdictions in the Western World with no such statute." 33 Tex. Bar J. 958, Eugene Smith (Dec., 1970).

What then is the substantial and compelling reason for such infringements of the illegitimate's basic civil rights? I submit that any rational for such discrimination in Texas fails the legitimate and rational purpose test as described, and further fails the test of equal protection in that it does not operate upon all members of the larger class equally. See *Skinner vs. Oklahoma*, 316 U.S. 535, 541 (1942) wherein the Court struck down Oklahoma's compulsory sterilization of habitual criminals as unequal protection because some crimes were excluded from the act.

In applying the Equal Protection Test to the facts in this case the Court should not only consider any need and rational for the discrimination against the illegitimate but should weigh this against the deprivation and results

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[16]Hooper, Illegitimacy, (1911), p. 27

from deprivation of the illegitimate's basic civil rights. What then are the circumstances directly attributable to the state's denial of support to the illegitimate and the state enforced stigma of illegitimacy flowing therefrom?

Socio-Economic Consequences of Illegitimacy Discrimination

While the illegitimate or bastard obviously is discriminated against with respect to support rights from his father, the full extent of the bastard-stigma enforced by this and other such state laws and customs shocks one's conscious. His status is little different today from what Davis described in 45 Am. J. Sociology 215 (1939);

> "The bastard, like the prostitute, thief, and beggar, belongs to that motley crowd of disreputable social types which society has generally resented, always endured. He is a living symbol of social irregularity, and undeniable evidence of contramoral forces; in short, a problem—"

The impact of the bastard-stigma is further noted in that to create a bastard is not yet an *actionable* tort, *Zepeda vs. Zepeda*, 190 N.E.2d 849 (1963), but to wrongfully call another a bastard is a defamatory epithet classed as a tort along with "immoral or unchaste, or queer . . . a coward, a drunkard, a hypocrite, a liar, a scoundrel, a crook, a scoundrel-mongrel, an anarchist, a skunk, a bastard, an eunuch—because all these things obviously tend to affect the esteem in which he is held by his neighbors." Prosser on Torts, 757-58 (3rd ed. 1964).

Under the present makeup of our society the illegitimate's reactions to life are bound to be completely abnormal. As one psychologist stated "to be fatherless is

hard enough, but to be fatherless with the stigma of illegitimate birth is a psychic catastrophe."[17]

Not only is the illegitimate totally deprived of a father-figure but as a study of illegitimates indicated, 52% of them had changed their mother-figure more than once since birth.[18] One presumes this to be the result of grandparents, sisters, aunts and foster mothers assuming much of the duties of caring for the children of young illegitimate mothers.

The emotional trauma experienced by an illegitimate child totally deprived of a father-figure and more than half the time deprived of a mother-figure is exemplified in a study of A.F.D.C. legitimate and illegitimate children's school, personal, and social adjustment.[19] The author of this persuasive study concluded:

> "Two primary patterns emerged in this study. First, the legitimate children rated higher in every area except school absences . . .
>
> The second disconcernible pattern was that the older group of illegitimate children consistently made a poorer showing than the younger group, in comparison with the legitimate children. A possible explanation of this is that, as these children grew older and are able to interalize fully the concept of illegitimacy and as they become increasingly aware of their socially inferior status, their adjustment to self and society may become progressively less satisfactory." p. 173.

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[17] Fodor, "Emotional Trauma Resulting From Illegitimate Birth" 54 *Archives of Neurology in Psychiatry*, (1945), p. 381

[18] Young, *Out of Wedlock*, (1954), pp. 237-238

[19] Jenkins, "An Experimental Study of the Relationship of Legitimate and Illegitimate Birth Status to School, Personal, and Social Adjustment of Negro Children, 64 *Am. J. Sociology*, (1958) p. 169

The illegitimate, provided he escapes his higher infant mortality rate, consistently shows a substantially higher rate than legitimate children in the areas of the incidences of juvenile delinquency, and neuroticism. He is significantly stigmatized by the nature of his birth.[20]

Comparable damaging psychological effects of discrimination was one of the motivating factors in the Court's striking down racial discrimination in *Brown vs. Board of Education*, 347 U.S. 483, 494 (1954).

An analysis of the children most affected by illegitimacy discrimination reveals that the socio-economic group least able to abandon the right of support from the child's father is the same group upon whom the consequences of illegitimacy most often fall. "There are very similar levels of difference in incidence of illegitimacy when one compares social classes, but it is easier to trace and analyze the difference by color."[21] In any event the group is ultimately revealed in the ensuing statistics. For example, 37.5% of women in families earning under $3,000.00 per year were pregnant at the time of their marriage in 1970, while only 8.5% of women in families earning $10,000.00 or more a year were pregnant at the time of their marriage.[22] Thus revealing the incidence of pregnancy outside of marriage for low income women exceeding that for middle to higher income women by more than four times. Middle income whites have a three

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[20] Podolsky, "Emotional Problem of the Illegitimate Child," 70 *Archives of Pediatrics*, (1953) p. 402 and Gillen, *Social Pathology*, 3rd Ed., (1946) p. 298, (that he is more likely to be neurotic, p. 311)

[21] Ryan, *Blaming the Victim*, (1971) p. 93

[22] U.S. Department of Health, Education & Welfare, U.S. Gov., National Center for Health Statistics, (1970)

times higher rate of post-pregnancy marriages than blacks.[23]

Because of abortion and adoption patterns in this country the black-white illegitimacy differentials are further expanded. The white illegitimate mother and child have substantially greater expectations of being assimilated into a stable social pattern than does the non-white illegitimate. For example, some 70% of all illegitimate white babies are adopted, while only 4% of non-white illegitimates can anticipate that good fortune.[24] Applying these adoption rates to the 3,428 illegitimate children born in Dallas in 1969,[25] and excluding the insignificant number of Mexican-Americans, the net results is that of the 2,229 black illegitimates born last year in Dallas after 4% or 89 of them are adopted, 2,140 still remain. Of the 1,059 white illegitimates born last year, after 70% of 741 of them are

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[23]Ryan, *Blaming the Victim*, (1971) p. 93; P. Garland, "Teenage Illegitimacy in Urban Ghettos," *Unmarried Parenthood*, (1967)

[24]U.S. Department of Health, Education & Welfare, Vital Statistics, *Illegitimacy's Impact on Aid for Dependent Children Program*, (1960), pp. 35-36.

Illegitimacy discrimination is even more repugnant when viewed in the light of these adoption practices. As was noted in *Blaming the Victim*, Ryan, 1971, at 111;

"Of course, as I have hinted, illegitimacy is functionally useful to society. To eliminate it would be to eliminate the raw material of the adoption process, whose products are sought after by childless middle class couples. The great surplus of unadopted illegitimate children is, by these standards, an untidy by-product of the process, substandard material that is to be thrown back onto the resources of the hopelessly inadequate child welfare and public assistance system."

[25]Texas, City of Dallas, Department of Vital Statistics

adopted only 318 will remain. Thus the ultimate illegitimate addition to the City of Dallas for 1969 was 87% black and 13% white.

The above statistics are based upon live illegitimate births and do not take into consideration the fact that the white pregnant girl has substantially more alternatives available to her than the non-white. For example, the incidence of abortions for illegitimate pregnancies in one study ranged from 83% for white college educated women, down to 25% for non-white high school educated women.[26] Because of financial, housing and social problems the non-white pregnant girl often finds unavailable either abortion, post-pregnancy marriage or adoption as alternatives to illegitimacy.[27]

A summary of the probable facts surrounding the illegitimate child in Dallas, Texas would thus reveal that he is 87% of the time black, most often in the lower income levels, that he comprises by far the largest segment of the children receiving Aid for Dependent Children, (28.5%)[28], that his life is or will become a "psychological catastrophe", that he will more often than his legitimate brother, be confronted with the problem of juvenile delinquency and neuroticism, that he will have lower grades in school but higher absences, that as he grows older he will become increasingly aware of his socially inferior status and his adjustment to self and

[26]Ryan, *Blaming the Victim*, (1971), p. 93. See also Erhardt, Tietze & Nelson, *Therapeutic Abortions in New York City*, (1965-1967)

[27]P. Garland, "Teenage Illegitimacy in Urban Ghettos," *Unmarried Parenthood*, (1967)

[28]Department of Public Welfare Commissioner Hackney's Testimony before Texas Senate Interim Committee on Welfare Reform, July 9, 1970

society will become progressively less satisfactory. He will receive no financial support from his father. Aside from the absence of a father-figure, which it is conceded many legitimate children do not have, he will also have a high incidence of transfer of the mother-figure. He may, as his parents did, give birth to an illegitimate.[29]

Formerly illegitimates were denied public office, suffered reduced penalties for their murder, could not be a witness in Court, had no burial rights, and escheated their bodies to medical science upon their death.[30] If this shocking treatment of the illegitimate which occurred three and four hundred years ago offends us today, how can this state justify the deprivation of the illegitimate's liberties so as to cause or even contribute to cause the plight in which we find him?

The State of Texas doesn't merely passively permit the bastard-stigma, it actively fosters and perpetuates a prejudice that is repugnate to this nation's concepts of justice.

> "Mr. Justice Jackson once spoke of the 'treacherous grounds we tread when we undertake to translate ethical concepts into legal ones, case by case' *Jordan vs. DeGeorge*, 341 U.S. 223, 242 (dissenting opinion). The difficulty and dangers are compounded when religion adds another layer of prejudice. The end result is that juries condemn what they personally disapprove." *United States vs. Vuitch*, 402 U.S. 62, at 79 (1971) (J. Douglas' dissent).

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[29]Barrett, *The Case of the Unwed Mother*, (1964). 49 Iowa L. Rev. 1005, at 1006

[30]Buckling, *Die Rechtsetellung Der Unehlichen Kinder Im Mittelalter Und In Der Heutigen Reformbewegung*, (1920)

Justice Douglas' dissent in *United States vs. Vuitch*, supra, at nl, page 78-79, although discussing the abortion issue, speaks directly to the problem of the bastard-stigma, when he set forth the psychiatric view;

> "Although the moral issue hangs like a threatening cloud over any open discussion of abortion, the moral issues are not all one-sided. The psychoanalyst Erik Erikson stated the other side well when he suggested that 'The most deadly of all possible sins is the mutilation of a child's spirit.' There can be nothing more destructive to a child's spirit than being unwanted, and there are few things more disruptive to a woman's spirit than being forced without love or need into motherhood."[31]

This state cannot justify separate schools for legitimates and illigitimates, it cannot justify a different wage rate for legitimates and illegitimates, it cannot justify different voting rights or different taxing principles or different military service obligations to legitimates and illegitimates. How then can it justify under the color of law its contribution to the above outlined socio-economic burdens of the illegitimate, be they purely economic or indirectly stigmatic?

Without attempting to anticipate the state's justification for illegitimacy discrimination in matters of the father's support obligation, which burden is strictly the state's, it should be pointed out that an enforced lack of support rights for illegitimates would certainly make it more difficult for the mother to establish a normal family relationship through subsequent remarriage. "Indeed, the law's failure to impose a substantial economic burden on the illegitimate's father may be more likely to encourage

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[31] *The Right to Abortion*: A Psychiatric View 218-219 (Group for the Advancement of Psychiatry, Vol. 7, Pub. No. 75, 1969)

illegitimacy than marriage." 36 Chic. L. Rev. 338 at 349, Equal Protection and Paternity, Krause, (1969).

The Supreme Court in *Smith vs. King* 392 U.S. 309 (1968), at least impliedly stated that Alabama's desire to promote morality and legitimacy by disqualifying certain illegitimate children from its welfare program did not have a sound or legitimate basis. The very concept of punishing the child in an effort to discourage promiscuity has no rational basis in fact nor can it be supported under Federal Constitutional Law. Such "punishing" is discussed at length in the section of this brief addressed to the child's rights under the Ninth Amendment.

The certainty or uncertainty of paternity should not be a factor in the Court's consideration of the issues before it in this case. These are matters of evidence and proof whereas the issue before this Court is concerned with determining whether the child and mother should have a right to initiate such a question in the State of Texas. Suffice it to say that an illegitimate's paternity can be medically established with a far greater degree of certainty than is shown by the presumption of legitimacy in the child born in lawful wedlock. At least one recent German case authoritatively considered a detailed blood test to establish a 99.55% probability of paternity.[32] "It is the function of Courts and juries to determine whether claims are valid or false. This responsibility should not be shunned merely because the task may be difficult to perform." *Samms vs. Eccles*, 358 P.2d 344, 347 (Utah, 1961).

The position assumed by the State of Texas to discriminate against the illegitimate in matters of support

[32] L.G. Koeln, 13.10.1961, 16 *Monatsschriftfuer Deutsches Recht*, (1962), p. 309

from his father is not based upon any overriding public interest. Furthermore, if the state has any overriding interest in controlling illegitimacy the denial to the illegitimate child of his rights to support from his father is a grossly over inconclusive classification of the parties against whom that legislation should be directed. Thus we are brought to the second part of the Equal Protection Test as expressed in *Shelton vs. Tucker*, 364 U.S. 479 at 488 (1960).

> ". . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."

Thus no persuasive reason appears to justify either the purpose or breath of illegitimacy discrimination in child support matters. This fact is made abundantly clear when it is considered that the illegitimate child, except for the matter of name and support, is in a situation very comparable to that of a child of divorced parents, which child has full rights of support.

After searching for a rational purpose to illegitimacy discrimination one well known writer in this area concluded there was no rational purpose and stated "our long continued acceptance of the legislatively enforced inequity between legitimate and illegitimate children may rest on much the same ground as the inferior position of women, Negroes and the classes through the centuries . . . prejudice." 65 Mich. L. Rev. 477, at 498 *Protection for the Illegitimate*, Krause (1967).

III.

Texas' Refusal To Permit an Illegitimate Child To Initiate an Action Against Her Father for Support, Denies Her Due Process of Law Under the Fourteenth Amendment to the United States Constitution.

"... nor shall any state deprive any person of life, liberty, or property without due process of law; ..." AMENDMENT FOURTEEN, Section 1, United States Constitution.

The State of Texas by statutory enactment and judicial decision has created an insurmountable barrier to any action by an illegitimate child to obtain support from its father. Just as in the preceding Equal Protection Test, unless the state can establish a rational basis for distinguishing the illegitimate from the legitimate, and present compelling reasons to justify such discrimination, then the illegitimate seeking a father's support has not been granted due process of law in Texas as guaranteed by the United States Constitution.

Due Process except where justified or excused by some reasonable classification, requires equal application of the law. *Shapiro vs. Thompson*, 394 U.S. 618 (1969). Such application manifestly is not present in this instance.

Inasmuch as there is no equal application of the law between the legitimate and the illegitimate in the State of Texas with respect to support from their fathers, then we are confronted with the deprivation of the same basic civil rights discussed under the preceding Equal Protection Clause, the same burden upon the State of Texas

to justify such discrimination, and the same appalling socio-economic conditions which are at least aggravated if not caused by the invidious discrimination practiced by the state against illegitimates.

Where the State of Texas has recognized a right of the legitimate child to receive property from his father in the form of aid and support, and has further permitted that child to call upon the Courts of this state to enforce that right, and has attached a criminal penalty against the parent for violating such right, Article 602 of the Texas Penal Code, and Article 4.02 of the Texas Family Code, the state cannot now contend that the deprivation of a father's support from an illegitimate child is not the deprivation of a property right.

The definition of property as protected by Due Process Law under the Fourteenth Amendment of the United States Constitution has never been strictly construed. The clause "property" as used in this Amendment means not only the mere thing which a person owns but it includes the right to acquire, use, and dispose of it, all of which essential attributes of property are protected by the Constitution. *Buchanan v. Wareley*, 245 U.S. 60 (1917). Thus the protection of the Due Process Clause is not restricted to "property" in the conventional sense. *Smalls vs. Ives*, 296 F. Supp. 448 (D.C. Conn., 1968).

The illegitimate's right to her child support, the same as any legitimate child, is thus a property right protected by the Due Process Clause of the Fourteenth Amendment. As to property rights in causes of actions see *Martinez vs. Fox Valley Bus Lines*, 17 F. Supp. 576 (D.C. Ill., 1936).

The United States Supreme Court denied certiorari, 390 U.S. 1028, in a New York case which broadly defined

"liberty" used in this constitutional context as not only the right of the citizen to be free from mere physical restraint of his person, such as by incarceration, but also embraced the right of a citizen to be free in the enjoyment of all of his facilities, to be free to use them in all ways, to live and work where he will, to earn his livelihood or avocation. *Madera vs. Board of Education of City of New York*, 386 F.2d 788 (2nd Cir., 1967).

While the Appellant contends that the failure of the State of Texas to afford adequate support remedies to an illegitimate child is a fundamental cause of the socio-economic calamity in which that child finds himself as described above, it is submitted that even if the state is only one of many contributing causes, then this state is depriving illegitimate children of their fundamental liberties and such action flies in the face of the Due Process privileges as guaranteed by the United States Constitution.

It is submitted, therefore, that the classification by the State of Texas as to legitimates and illegitimates for determining their rights of support from their natural father deprives children of unwed parents of their "liberty" as well as their property in dollars and "property in rights". James Madison underscored the need of the government to protect its citizen's "property in rights" to the same extent it would guard one's "rights of property".[33]

Where an illegitimate child is, without rational basis, deprived of his liberties or property as a result of acts of parties committed contemporaneous with his conception but long prior to his birth, it would necessarily be

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[33]James Madison, *The Right to Property and Property in Rights*, Madison Letter IV, "Property," 3 Annals of America 497

concluded that he is totally and completely deprived of due process of law.

If the state cannot justify the levying of a special tax on illegitimates, (a gross constitutional violation, then how can it justify bestowing special economic privileges upon the legitimate?

IV.

The Illegitimate's Right to Support from Her Natural Father Is a Fundamental Right and Liberty the Deprivation of Which Violates the Protections of the Ninth Amendment of the U.S. Constitution.

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." AMENDMENT NINE, United States Constitution.

The United States Supreme Court has not exhibited any hesitancy to hold the right of the individual to enjoy a family relationship as a basic fundamental civil right. *Skinner vs. Oklahoma*, 316 U.S. 535 (1942); *Griswold vs. Connecticut*, 381 U.S. 479 (1965); and *Loving vs. Virginia*, 388 U.S. 1 (1967).

"It would seem to be beyond question that the child's right to a familial relationship with his father is more akin to a "fundamental right and liberty" or a basic civil right of man than to a mere economic interest".[34] The initial District Court in this case had previously recognized the problem of illegitimate discrimination as "a basic civil

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[34] 65 Mich. L. Rev. 477 at 488, *Equal Protection for the Illegitimate*, Krause, (1967)

right". *Jefferson vs. Hackney*, 304 F. Supp. 1332, 1341 (1969).

Given then the fact that interference in the family relationship constitutes a deprivation of a basic civil right and given the additional fact as presented in the Equal Protection portion of this brief, that there is no rational basis for such severe interference with the family relationship it would seem to follow on its face that the act of the State of Texas in providing relief to legitimate children but denying it to illegitimates is an unconstitutional deprivation of basic civil rights under the Ninth Amendment of the United States Constitution.

Although Appellant does not contend that this Court should grant the relief prayed for because of violations in and for themselves of the Eighth Amendment and Third Article of the United States Constitution, it is submitted, that both of these constitutional guarantees deal with basic civil rights and as such are similarly protected under the provisions of the Ninth Amendment upon which Plaintiff does rely.

Article III of the United States Constitution provides:

> "The Congress shall have Power to declare the Punishment of Treason, but no attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained."

It is often contended that by eliminating the right of the illegitimate child to receive support from his father the state will discourage promiscuity and illicit sex. Irrespective of the effectiveness of such intent or even of its legality of purpose, one cannot rationalize any basis whereby we may properly punish the child in order to invoke guilt feelings in the mother or father to whom we are directing the sanctions of the law.

Justice Douglas noted this concept in his concurring opinion in *Smith vs. King*, 392 U.S. 309, 336 n. 5 (1968), wherein he stated;

> "This penalizing the children for the sins of their mother is reminiscent of the archaic corruption of the blood, a form of a bill of attainder, . . ."

While the problems of the illegitimate are serious and growing more so daily in our society, they nonetheless represent a symptom and not the cause. Blaming the illegitimate himself will serve only to further stigmatize the nature of his birth as a bastard and contribute to the problem and not the solution.[35]

One cannot see how a citizen in this state or country can be punished as an innocent "non-party" for someone else's undesirable conduct. Despite that fact, the state's refusal to permit the illegitimate to enjoy the same fruits of support as the legitimate child carries into full effect that very irrational concept.

One could ask as Justice Douglas did in *Levy vs. Louisiana*, 391 U.S. 68, 72 (1968);

> "Why bastard, wherefore base? When my dimensions are as well compact, my mind as generous, and my shape as true, as honest Madam's issue? Why brand they us with base? With baseness? Bastard? Base, base?" W. Shakespeare, *King Lear*, Act I, Scene 2.

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[35]Ryan, *Blaming the Victim*, p. 110. Where Ryan, a former Harvard and Yale Medical Schools psychologist and sociologist said: "The 'problem' of illegitimacy is not due to promiscuity, immorality, or culturally-based variations in sexual habits; it is due to discrimination and gross inequities between the rich and poor, and more particularly, between white and black. It is the visible sign and outcome of a total pattern of inequality in the distribution of, and access to significant resources. . ."

Not only does the state's irrational classification of the illegitimate punish an innocent "non-party" for someone else's conduct, but as such the punishment inflicted would seem to be of a cruel and unusual nature. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted," EIGHTH AMENDMENT, United States Constitution (emphasis added).

The United States Supreme Court in *Trop vs. Dulles*, 356 U.S. 86, 100-101 (1958) outlined the constitutional theory of cruel and unusual punishment.

> "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . the words of the Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the progress of a maturing society."

The Court shortly thereafter found that a condition innocently or involuntarily entered into and for which the individual was punished was invalid and was "cruel and unusual" under the Eighth and Fourteenth Amendments. *Robinson vs. California*, 370 U.S. 660 (1962).

One writer after reviewing *Robinson vs. California*, supra, and other related opinions concluded "even the narrowest of these interpretations (supports) the notion that *punishing a status involuntarily entered into and which cannot voluntarily be abandoned is unconstitutional*."[36] (emphasis added.)

Despite the fact that the illegitimate child can neither control the fact of his being nor alter the conditions of

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[36] Amsterdam, *Federal Constitutional Restrictions on Punishment*, 3 Crim. L. Bull. 205 (1967)

his illegitimacy, the State of Texas continues to deprive him of the same rights they afford to other legitimate children.

It is well established that a third party is not responsible for acts of persons beyond its control, *N.A.A.C.P. vs. Overstreet*, 384 U.S. 118 (1966); and that ancestral distinctions are "by their very nature odious to a free people". *Oyama vs. California*, 332 U.S. 633, 646 (1948). In that case the Court refused to inflict harm on a child because of the status of his alien father.

The Supreme Court of this nation has already noted in *Skinner vs. Oklahoma*, 316 U.S. 535 (1942), that to permit a state to curtail the existence of a particular class of individuals by the use of enforced sterilization, was a dangerous intrusion into the basic civil rights of man. A compelling argument can be made for the wrong in permitting the procreation of an infant and to then enforce unusual and extremely detrimental circumstances upon his life because of the behavior of his ancestors.

As was pointed out in the Petitioner's brief in *Levy v. Louisiana*, 369 U.S. 68 (1968), if corruption of the blood is explicitly forbidden by the constitution with respect to the heinous crime of treason, it certainly should not be permitted in a lesser context. "The son shall not bear the inequity of the father". Ezekiel 18:20

Thus the discriminatory classification of the illegitimate by the State of Texas may well work a violation of Article III of the United States Constitution prohibiting a corruption of the blood and of Amendment Eight of the United States Constitution forbidding Cruel and Unusual Punishment, but in any event such action by the State of Texas deprives the illegitimate child in this case of his basic and fundamental civil liberties and does so without

any rational overriding state concern and is, therefore, a clear and undisputed breach of the child's rights under the Ninth Amendment of the United States Constitution.

V.

Texas' Invidious Discrimination Against an Illegitimate Child in Support Matters Operates to Deny that Child's Mother Her Fundamental Liberty Under the Provisions of the Ninth Amendment of the United States Constitution.

The adverse circumstance in which the illegitimate finds himself in Texas is certainly compounded and aggravated by the refusal of the state to permit that illegitimate child to collect support from its father. It would not be wrong to assume that a pregnant unwed woman is fully aware of the stigmas that will attach to her illegitimate child as well as the extreme financial and social hardship that will be brought to bear upon the child. The State of Texas, through its discriminatory application of the child support provisions, enforces and accentuates the already harsh economic world for the mother of the illegitimate child.

The Garland study concluded that non-whites beset by financial, housing and social problems often have unavailable to them the alternatives to rearing an illegitimate child which are available to a pregnant white woman.

The apparent alternatives to rearing an illegitimate child aside from post-pregnancy marriage, are abortion or abandonment either in the form of legal adoption or giving the child to other parties to rear. The Court will recall the previous statistics that some 70% of white

children, but only 3% of blacks are adopted and the additional differential of 83% white college women abortions compared to 25% black high school educated.[37] Whether it is the social stigma or the economic capacity among the whites that result in significantly more adoptions and abortions, the point remains that at least one group of unmarried pregnant women is turning to abortions and adoptions to solve their problem of illegitimacy.

While it is undisputed that the State of Texas enforces a withholding of economic support from the father of the illegitimate child, it should also be seen that this action by the state is one of the primary sources of the stigma of bastard which afflicts the illegitimate.

It is reasonable to assume that a significant portion of unmarried pregnant women would not turn to abortion or adoption were it not for the stigma of the bastard concept and the economic hardship which they foresee. The State of Texas has thus brought to bear upon the mother of the illegitimate child a form of economic and social coercion which is not insignificant in promoting abortions and abandonment by the mother of that child. The circumstances would be little different if the state, as a population control, excluded all babies born in September from support rights, and next year extended the exclusion to all children of Protestant parents. In either event economic coercion is forced on the mother.

Thus we reach an infringement of the mother's basic fundamental liberties as guaranteed by the Ninth Amendment of the United States Constitution. The Supreme Court of this nation has long ago held that the procreation of children is fundamental to the very

[37] Ryan, *Blaming the Victim*, p. 96

existence and survival of the race, *Skinner vs. Oklahoma*, 316 U.S. 535, 541 (1942). Is there any liberty more fundamental or freedom more basic than the right of a mother to *freely* elect to have and keep her child?

> "Unless the state has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children and day to day living habits." *Griswold vs. Connecticut*, 381 U.S. 479, 492 (1965).

A woman's liberty and right of privacy extends to family, marriage and sex. *Loving vs. Virginia*, 388 U.S. 1 (1967).

A right by the mother to *freely* elect to have and keep her own child must indeed be within the area of the Ninth Amendment guarantee which the United States Supreme Court in *Powell vs. Alabama*, 287 U.S. 45, 67 (1932) described as a right;

> "... of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions..."

Appellant submits to the Court that it is amply understood that the enforced withholding of economic support to the illegitimate child creates a type of economic coercion as well as perpetuates the social stigma of the bastard, which coercion and stigma frequently compel the mother to elect the alternatives of abortion or adoption. In either event the mother, though she may desire otherwise, but motivated by a concern for her child's best welfare, is forced to abandon one of the most fundamental privileges and freedoms of this nation, that is the right to *freely* choose whether to have and keep a child. *Any action* by the State of Texas to enforce such coercion upon the mother of the illegitimate bears

the closest of scrutiny and should reveal a very large overriding public concern and rational for such state action.

Warner, in the *Unmarried Mother in German Literature*[38] described the beginning of illegitimate infanticide as having its roots in the condemnation by the church of the mother's pregnancy, and resulted from the mother's attempts to conform with the church's requirements by secretly killing her illegitimate child.

One today can see but a slight sophistication, wherein the state, instead of the medieval church, brings to bear upon the unwed mother a form of economic coercion which effectively induces abortions of unborn illegitimates, and abandonment by adoption.

VI.

Texas' Denial to this Illegitimate Child a Right of Support from Her Father, Constitutes a Violation of the Mother's Due Process and Equal Protection Guarantees of the Fourteenth Amendment to the United States Constitution.

The theory, concept and test of the Equal Protection Clause and Due Process of Law Clause of the Fourteenth Amendment to the United States Constitution has

[38] Warner, *Unmarried Mother in German Literature*, p. 24 and p. 27, (1917)

"The unusual punishments for infanticide during the middle ages and even into the 18th Century were: sacking . . . an infant being sewed up in a sack and thrown into the water; burying alive . . . ; impaling . . . a pointed stick being driven into the heart; and burning alive . . . these cruel forms of punishment by the Civil Courts . . . were paralled by the most humiliating public church penance for the unmarried mother who did not kill her child."

already been outlined above. The Supreme Court has permitted an illegitimate's mother to recover for that child's wrongful death, holding that:

> "When the claimant is plainly the mother, the state denies equal protection of the laws to withhold relief merely because the child, wrongfully killed, was born to her out of wedlock." *Glona vs. American Guaranty & Liberty Ins. Co.*, 391 U.S. 73, 76 (1968).

If, as the U.S. Supreme Court has declared in *Loving vs. Commonwealth*, 388 U.S. 1 (1967), the right to marry is protected by the Fourteenth Amendment Due Process Clause, because such right is vital to the personal right essential to the orderly pursuit of happiness, then certainly that same immunity should apply to the right to freely elect to bear and keep one's own child without *any* degree of coercion to the contrary by the state.

It has already been seen that the State of Texas exerts economic coercion upon the mother which can tend to compel her to abort or abandon her illegitimate child. Such pressure in any form violates not only the Ninth but the Fourteenth Amendment rights of the mother.

A state should be slow to condemn a mother's wrongdoing in giving birth to an illegitimate child when that same state permits to go stark free and totally without economic restraint the father who certainly was an equal participant. Benjamin Franklin may have perceptively defined that problem when he had the fictitious and unmarried Polly Baker complain[39] that her seducer and betrayer and the cause of her misfortunes had gone

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[39] Smith, *The Writings of Benjamin Franklin*, Vol. 2, pp. 463-467, (1747)

on to honor and power while she was left pleading before the Court. She asked;

"... but how can it be believed that heaven is angry at my having children, when to the little done by me toward it God has been pleased to add his divine skill and admirable workmanship in the formation of their bodies and crowned it by furnishing them with rational and immortal souls?"

If it be determined that the mother in this instance was wrong in not complying with the form of the family relations deemed proper by the state, is it such a wrong as to justify an economic coercion and social stigma that deprives her rights of Due Process and Equal Protection of the laws. Appellant submits that it is not.

CONCLUSION

Neither the Texas common law nor statutory enactments permit the illegitimate child to enforce support from her father although these privileges are afforded legitimate children in this state. Appellants submit to the Court that such illegitimacy discrimination is a violation of the child's Equal Protection and Due Process of Law guarantees under the Fourteenth Amendment to the United States Constitution and furthermore is a deprivation of their basic and fundamental civil rights in violation of the Ninth Amendment to the United States Constitution.

The discriminatory exclusion of the illegitimate child's support rights from her father works a significant economic coercion on the mother which results in depriving her of her own fundamental liberties under the Ninth Amendment and of the Equal Protection of the Laws and of Due Process of Law under the Fourteenth Amendment to the United States Constitution.

The magnitude of the problem of illegitimacy in sheer numbers and perhaps more significantly in resulting socio-economic consequence, to each child of an unwed parent, results in an injury to child and mother within the "zone of interest" of Article 602, and thus Appellants have standing to sue.

If the law of this state as sanctioned by the United States Constitution and the Courts does not express a duty on the part of the illegitimate's father to care for his child then society should not expect that father to voluntarily recognize and assume such duty. Equally important perhaps with the economic factors involved in this case is the recognition that even an unwilling father forced to assume his responsibilities to his child would help to remove the social stigma of illegitimacy which so afflicts the innocent youngster.

The illegitimate, absent his own participation, has been categorized without rational basis, stripped of his dignity without due process, and relegated to a socio-economic catastrophe closely akin to cruel and unusual punishment; this because of a centuries old myth that this blood is corrupt. While the concept may have originated in the church and has been perpetuated by prejudice of the people, it has, in any event, enjoyed the endorsement of the state. Until this inequity and injustice is rectified by an application of constitutional restraint it can scarcely be hoped that the illegitimate will enjoy "the promise of America."

> "To every man his chance, to every man regardless of his birth, his shining opportunity . . . to every man, the right to live, to work, to be himself and to become whatever thing his manhood and his wisdom can combine to make him—this . . . is the promise of America." *Thomas Wolfe*

PRAYER

WHEREFORE, Appellants pray that the decision of the Three Judge District Court be reversed, that a permanent mandatory injunction issue, requiring the Dallas County District Attorney and the State of Texas to cease discriminatorily excluding children of unwed parents from the benefits of its child support laws, and specifically from excluding children of unwed parents from the benefits of Article 602 of the Texas Penal Code.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this brief is mailed this____ day of June, 1972, return receipt requested, certified mail, to Mr. Pat Bailey, Assistant Attorney General, Capitol Station, Austin, Texas, Attorney for the State of Texas, and to Mr. John Tolle, Assistant District Attorney, Dallas County Government Center, Attorney for Henry Wade, Dallas County District Attorney, Dallas, Texas 75202.

Windle Turley
Attorney for Appellants

Clerk of the Court

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

NO. 71-6078

LINDA R.S., ET AL.,

Appellants

V.

RICHARD D. AND TEXAS, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

BRIEF FOR APPELLEES

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

COME NOW the Appellees, the State of Texas, Robert Calvert, Chief Justice of the Texas Supreme Court, and Crawford C. Martin, Attorney General of Texas, and file Appellees Brief in response to Appellants' Brief heretofore filed.

STATEMENT OF THE CASE

This action is an appeal by the Appellants, Linda R.S., her minor child, and all other mothers and children of the class they allegedly represent from the judgment entered by the Court below on the 1st day of November, 1971, in a class action commenced by the Appellants against the Appellees, wherein the Appel-

lants sought: (1) a declaratory judgment holding invalid Article 602 of the Texas Penal Code and Article 4.02 of the Texas Family Code, (2) an injunction requiring the State of Texas and its officers to cease certain alleged discriminatory application of Article 602 of the Texas Penal Code and Article 4.02 of the Texas Family Code, and (3) an order requiring Richard D., the alleged father of Linda R. S.'s child to pay child support.

The Appellants in this proceeding are women and minor children who have sought, are seeking, or in the future will seek to obtain support for illegitimate children from the child's father.

The Court below, in its judgment entered on the 1st day of November, 1971, held that the Appellants lacked the proper standing to challenge the validity of Article 602 of the Texas Penal Code and dismissed that portion of the case. As to the remaining portion of Appellants' case, the Court below held that the provisions of Article 4.02 of the Texas Family Code were of such nature as to be improper for consideration by a three-judge federal court and remanded this portion of the proceeding to the judge to whom the application for injunction was originally presented for further proceedings.[1]

From the foregoing action of the Court below, the Appellants have brought this appeal.

OPINION BELOW

The opinion of the United States District Court for the Northern District of Texas, Dallas Division, rendered on the 1st day of November, 1971, is reported at 335 F.Supp. 804. The District Court's dismissal of Ap-

[1] On or about the 8th day of June, 1972, the Court entered its order of dismissal in connection with the challenge to Article 4.02 of the Texas Family Code. Such order of dismissal is found as Appendix "A" of this brief.

pellants' challenge to Article 4.02 of the Texas Family Code is found as Appendix "A" to this brief.

STATUTES INVOLVED

Article 4.02 of the Texas Family Code provides that:

> "Each spouse has the duty to support his or her minor children. The husband has the duty to support the wife and the wife has the duty to support the husband when he is unable to support himself. A spouse who fails to discharge the duty of support is liable to any person who provides necessaries to those to whom support is owed."

Article 602 of the Texas Penal Code provides that:

> "Any husband who shall willfully desert, neglect or refuse to provide for the support and maintenance of his wife who may be in necessitous circumstances, or any parent who shall willfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not more than two years."

QUESTIONS PRESENTED

1. Whether the Appellants have standing to challenge the validity or constitutionality of Article 602 of the Texas Penal Code?
2. Whether the provisions of Article 602 of the Texas Penal Code are in violation of the Constitution of the United States?

ARGUMENT

"Whether the Appellants' have standing to challenge the validity or constitutionality of Article 602 of the Texas Penal Code?"

The Court below held that the Appellants lacked the proper standing to challenge the validity of Article 602 of the Texas Penal Code and dismissed that portion of Appellants' case.

Article 602 of the Texas Penal Code provides that any "husband" who fails to support his wife, or any "parent" who fails to support his "child" is subject to criminal prosecution and punishment. However, the Texas courts have held that only parents of legitimate children may be criminally prosecuted under Article 602 of the Texas Penal Code. *Beaver v. State,* 256 S.W. 929 (Tex.Crim.App. 1923).

As the Appellant, Linda R. S., is the mother of an illegitimate child, she could not be criminally prosecuted for failure to support her child and is in absolutely no danger of being prosecuted for a violation of Article 602 of the Penal Code. As was noted by the Court below, the proper party to challenge the validity or constitutionality of Article 602 of the Texas Penal Code would be a parent of a legitimate child who was being prosecuted pursuant to Article 602. The challenge in such a case would be on the basis that because the parents of illegitimate children may not be prosecuted, the statute unfairly discriminates against the parents of legitimate children.

The decision by this Court in *Flast v. Cohen,* 392 U.S. 83, 20 L.Ed.2d 947, 88 S.Ct. 1942 (1968), contains one of the most comprehensive treatments involving the issue of standing which is now once again before the Court. The following statements from this Court's decision are most revealing in view of the facts here presented:

> "The jurisdiction of the federal courts is defined and limited by Article III of the Constitution. In terms relevant to the question for decision in this

case, the judicial power of federal courts is constitutionally restricted to 'cases' and 'controversies.' . . . Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. . . .

"Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action. . . .

". . . And it is quite clear that 'the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.' C. Wright, Federal Courts 34 (1963). Thus, the implicit policies embodied in Article III, and not history alone, impose the rule against advisory opinions on federal courts. . . .

However, the rule against advisory opinions also recognizes that such suits often 'are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests.' United States v. Fruehauf, 365 US 146, 157, 5 L Ed2d 476, 483, 81 S Ct 547 (1961). Consequently, the Article III prohibition against advisory opinions reflects the complementary constitutional considerations expressed by the justiciability doctrine: Federal judicial power is limited to those disputes which confine federal courts to a

role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.

". . .

". . . The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' Baker v. Carr, 369 US 186, 204, 7 L Ed2d 663, 82 S Ct 691 (1962). In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. . . . A proper party is demanded so that federal courts will not be asked to decide 'ill-defined controversies over constitutional issues.' United Public Workers v. Mitchell, 330 US 75, 90, 91 L Ed 754, 768, 67 S Ct 556 (1947), or a case which is of 'a hypothetical or abstract character,' Aetna Life Insurance Co. v. Haworth, 300 US 227, 240, 81 L Ed 617, 621, 57 S Ct 461, 108 ALR 1000 (1937). . . .

". . . It is for that reason that the emphasis in standing problems is on whether the party invoking federal court jurisdiction has 'a personal stake in the outcome of the controversy,' Baker v. Carr, supra, at 204, 7 L Ed2d at 678, and whether the dispute touches upon 'the legal relations of parties having adverse legal interests.' Aetna Life Insurance Co. v. Haworth, supra, at 240-241, 81 L Ed at 621, 108 ALR 100. . . ."

Since the decision by this Court in *Flast v. Cohen*, there have followed such cases as *Jenkins v. McKeith-*

en, 395 U.S. 411 (1969), *Data Processing Service Organization v. Camp,* 397 U.S. 150 (1970), *Arnold Tours v. Camp,* 400 U.S. 45 (1970), *Investment Company Institute v. Camp,* 401 U.S. 617 (1971), and *Barlow v. Collins,* 397 U.S. 159 (1970). These cases since *Flast v. Cohen* appear to represent no departure from the basic teaching of *Flast v. Cohen* although they do give rise to the so-called "zone of interest" reasoning. However, it would hardly appear that the "zone of interest" concept has cast aside the statements found in *Flast v. Cohen* that ". . . the fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. . . .", and that ". . . when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself it justiciable. . . ."

Certainly the issue of whether Article 602 of the Texas Penal Code is in violation of the Constitution of the United States is a justiciable one, but the question here presented is whether Appellants have the necessary standing to raise this issue. In the absence of such standing, for the federal courts to pass on the constitutional question would be a radical departure from this Court's long-standing rule and position against the giving of advisory opinions.

In the present case, the Appellants are challenging the constitutional validity of a penal provision, which has been declared by State court decision to be inapplicable to Appellants and the class they represent, and even should this Court declare the penal provision invalid it would have no effect on Appellants or their class, or fathers of illegitimate children but would merely prevent criminal prosecution of parents of

legitimate children pursuant to its provisions. Apparently the logic of Appellants' position is that if the fathers of illegitimate children cannot be prosecuted pursuant to Article 602 of the Texas Penal Code, then the fathers of legitimate children should also be denied this peril. While this is indeed a strange position to be taken by those concerned with the interests of children, it is apparently based on the concept that if possibly the courts will invalidate this penal provision in its present form it may ultimately result in the Legislature of the State of Texas broadening the scope and operation of Article 602 of the Penal Code. The fallacy of Appellants' position is most aptly set forth by the comments of the District Court below in its later order dismissing Appellants' challenge to Article 4.02 of the Family Code:

> "If the statute is declared unconstitutional the result is there would be no civil statutory requirement for the support of children—legitimate or illegitimate. It is clearly in the interest of the State for children to be supported and in this writer's opinion there is no rational basis for a distinction between legitimate and illegitimate children. But 'invalidating legislation is serious business. . . .' *Morey v. Doud,* 354 U.S. 457, 474 (1957). To hold that the Equal Protection clause should apply would invalidate a statutory provision of critical importance to Texas' carefully drawn Family Code. I am unwilling to construe the Equal Protection clause in such a way as to bring about the result of having no requirement in Texas law for the support of children. Such action would indeed be a backward step in the State's concept of the duties and obligations of parents and in the social program of the State.
>
> "On the other hand, to declare that the statute should be interpreted to require fathers to support illegitimate children is equally untenable. The fact that a State has failed to provide a rem-

edy for a wrong does not thereby vest the federal courts with the authority to legislate by judicial fiat what a state legislative body has either refused or failed to enact. As declared in *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965), the federal courts 'do not sit as a super-legislature to determine the wisdom, need and propriety of law that touch . . . social conditions.' While in the opinion of this writer, fathers of illegitimate children should be required to support their children this is a matter to be remedied by the Texas Legislature and not by the Court."

While the foregoing dealt with the civil statutory provisions challenged by the Appellants, the logic and reasoning are equally applicable to Appellants' challenge to the penal provisions here involved—Article 602 of the Texas Penal Code.

The Appellants no doubt have interest concerning the provisions of Article 602 of the Texas Penal Code because they would like to see it extended so that fathers of illegitimate children could be prosecuted for failure to support their children, but this interest is one properly directed to legislative halls and not the Courts. Certainly, Appellants' "zone of interest" in this matter could hardly be said to extend to the point of freeing from possible criminal prosecution the fathers of legitimate children.

The Court below reached the conclusion that the Appellants did not have the necessary standing to raise a challenge to Article 602 of the Texas Penal Code. Appellees submit that this was the proper result. If the provisions of this penal act are to be challenged by someone, then let it be by one who stands to suffer penalties from its enforcement—not someone who merely seeks to have it broadened to extend to others.

"Whether the provisions of Article 602 of the Texas Penal Code are in violation of the Constitution of the United States?"

The challenge of the Appellants in the Court below was a two-fold one. In one thrust, the Appellants questioned the validity of a penal provision, and in the other they questioned the validity of civil statutory provision. As to the criminal provision, Article 602 of the Texas Penal Code, the Court below held that the Appellants did not have the necessary standing to challenge this provision and dismissed this portion of Appellants' suit. As to the civil provision, Article 4.02 of the Texas Family Code, the Court below recognized that such a challenge was improper for consideration by a three-judge federal court as there was no state officials or officers involved in the operation of Article 4.02. As noted by the Court below, Article 4.02 of the Texas Family Code is enforced through a civil suit for damages against a defaulting spouse. This portion of Appellants' suit was remanded to the District Court for consideration by a one-judge court. The order of dismissal ultimately entered in this portion of the proceeding is found as Appendix "A" to this brief, and to this date the Appellees are unaware of any Notice of Appeal being made as to this decision in that portion of their case.

While the Appellants have used the vehicle of their challenge to Article 602 of the Texas Penal Code to bring their case before this Court, their entire argument seems to be based on the reasoning used in the challenge to Article 4.02 of the Texas Family Code which deals with obtaining a form of child support—not with the criminal prosecution of parents under the provisions of Article 602 of the Texas Penal Code. Consequently, it becomes difficult to come to grips with just what issues the Appellant wishes to litigate

at this point. Appellees would suggest that the Appellants are in actuality attempting to get the Court to pass primarily upon the provisions of Article 4.02 of the Texas Family Code and have seized upon the indirect way of accomplishing this by their pursuit of the challenge to a penal provision somewhat related in nature. This would seem especially true in light of the fact that Appellants have spent the majority of their argument contending that the challenged provisions are unconstitutional, but in their prayer for relief have asked:

> ". . . that a permanent mandatory injunction issue, requiring the Dallas County District Attorney, and the State of Texas to cease discriminatorily excluding children of unwed parents from the benefits of its child support laws, and specifically from excluding children of unwed parents from the benefits of Article 602 of the Texas Penal Code."

In this same connection, it becomes increasingly difficult to follow the logic or reasoning of just what Appellants are seeking. Their urgent pleas for a determination that the challenged statutes are unconstitutional is immediately followed by their request that the Court not only breathe life back into these statutes but enlarge upon their scope of operation. Perhaps the Appellants merely seek to have the courts judicially legislate what the Legislature of the State of Texas has to date failed or refused to enact.

While not wishing to debate the sociological and economic arguments advanced by Appellants to justify requiring the natural father of an illegitimate child to assume the burden of support of such child, Appellees are of the opinion that in this case such a decision is one which must be determined in legislative halls rather than by judicial fiat. Consequently, the decision

rendered by the court below should be affirmed. Such a decision would neither offend nor conflict with this Court's previous decisions in *Levy v. Louisiana*, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed2d 436 (1968); *Glona v. American Guaranty and Liability Ins. Co.*, 391 U.S. 73, 88 S.Ct. 1515, 20 L.Ed.2d 441 (1968); *Labine v. Vincent*, 401 U.S. 532 (1971); or *Weber v. Aetna Casualty & Surety Co.*, 40 L.W. 4460 (April 24, 1972).

In Texas, the natural father of an illegitimate child is under neither a common law nor statutory duty to support his illegitimate children. *Home of the Holy Infancy v. Kaska*, 397 S.W.2d 208 (Tex. 1966); *Lane v. Phillips*, 69 Tex. 240 (Tex. 1887); *Beaver v. State*, 96 Tex. Crim. 179, 256 S.W. 929 (1923). Whether this long recognized principle in the jurisprudence of the State of Texas is to join the rapidly swelling ranks of those statutes and legal decisions of Texas and other states invalidated by the ever growing and proliferating demands of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, necessitates an examination of those cases in this area commencing with *Levy*.

Levy was an action on behalf of minor illegitimate children for the wrongful death of their mother. The children had sued to recover under a Louisiana statute, and the Louisiana courts had held that "child" in the wrongful death statute meant "legitimate child." The appeal to the United States Supreme Court was based upon the contention that such a result constituted a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States. *Glona* was a companion case involving the same facts with the exception that it was an action to recover by the mother for the wrongful death of an illegitimate child. Footnotes in

the case of *Levy v. Louisiana* reveal that under Louisiana law both parents are under a duty to support their illegitimate children.

The court in *Levy v. Louisiana* stated that:

> "The rights asserted here involve the intimate, familial relationship between a child and his own mother. When the child's claim of damage for loss of his mother is an issue, why, in the terms of 'equal protection,' should the tort feasors go free merely because a child is illegitimate? . . .
>
> ". . .
>
> "We conclude that it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother."

In *Glona* this Court applied the same reasoning as in *Levy,* but of interest is this Court's statement, or possible warning, in its opinion that:

> "Opening the courts to suits of this kind may conceivably be a temptation to some to assert motherhood fraudulently. That problem, however, concerns burden of proof. *Where the claimant is plainly the mother,* the state denies equal protection of the laws to withhold relief merely because the child, wrongfully killed, was born to her out of wedlock." (Emphasis added.)

The foregoing statement is significant in the present case because Appellants would have this Court venture into that new area where parenthood is not so readily proved or disproved.

Whether the decision in *Levy* and *Glona* would be extended beyond the relationship between the mother and the illegitimate child so as to include relationships involving the father was most interestingly commented upon by the court in the case of *Jerry Vogel Music Co.*

v. Edward B. Marks Music Corp., 425 F.2d 834 (2nd Cir. 1969), where in the opinion it was held that:

"Plaintiff pretermits what an enthusiast over *Levy* characterizes as 'the interesting question . . . whether it will be extended to the father-child relationship,' with what is considered the pleasant result of invalidating 'hundreds of state statutes and several federal laws' [footnote — Krause, Legitimate and Illegitimate Offspring of Levy v. Louisiana — First Decisions on Equal Protection and Paternity, 36 U. Chic. L. Rev. 338, 339 (1969)] — not to speak of the common law rule in force when the Fourteenth Amendment was adopted. The highest courts of Ohio and Missouri have reached differing results concerning the illegitimate child's right to paternal support, Boston v. Sears, 15 Ohio St. 2d 166, 239 N.E.2d 62 (1968); R—— v. R——, 431 S.W.2d 152 (Mo. 1968); cf. Munn v. Munn, 450 P.2d 68 (Colo. 1969). In Schmoll v. Creecy, 54 N.J. 194, 254 A.2d 525 (1969), the Supreme Court of New Jersey refused, in the light of Levy to follow a direction in the state's wrongful death statute keying recovery to those entitled to take by intestacy when that course would have ruled out illegitimate children of a father. The effect of *Levy* and *Glona* in cases of actual intestacy of the father, which *De Sylva* held to be the closest parallel to the forced succession of the Copyright Act, seems not yet to have been directly decided by the highest court of any state. But see In re Estate of Jensen, 162 N.W.2d 861, 877-879 (N.J. 1968); Succession of Bush, 222 So.2d 642 (La. Ct. App. 1969); Strahan v. Strahan, 304 F.Supp. 40 (W.D. La. Sept. 22, 1969).

"We find it unnecessary to attempt to forecast whether the Supreme Court will differentiate between the situations of the father and of the mother [footnote — We do suggest, however, that the differences in the problem of proof are not to be minimized. As any lawyer with experience in defending against claims of relationship advanced

long after the critical date would vividly realize, it is altogether too simplistic to say 'Recovery should be denied in the absence of proof, but granted in the presence of proof.' See Krause, supra, 36, U. Chic. L. Rev. at 344]."

Before discussing *Labine* and *Weber,* it would seem that this Court has already indicated its reluctance to extend the decision in *Levy* and *Glona* beyond the facts presented in such cases. *Levy* and *Glona* were decided on May 20, 1968, and less than a month later, on June 17, 1968, this Court rendered its decision in the case of *King v. Smith,* 392 U.S. 309 (1968). This case dealt with whether the "substitute father rule" of the State of Alabama, in connection with its operation of the AFDC Program (Aid to Families With Dependent Children) was in conflict with the provisions of the Social Security Act and the Constitution of the United States. The court in its decision based its decision upon the Social Security Act rather than constitutional grounds in deciding that the Alabama rule was invalid. However, it is interesting to note in the concurring opinion in *King* an attempt was made to base the decision upon the reasoning of the court in *Levy,* but apparently the majority of the court did not desire to so extend the doctrine of *Levy.* This becomes even more important when one considers and studies the facts actually before the court in *King.* In Alabama, only legitimate children are entitled to support from their parents. If the doctrine of *Levy* was intended by this Court to be extended to the relationship between an illegitimate child and its natural father, then the result reached in *King* would have been decidedly different. The court in its decision in *King* stated that:

". . . Whether the substitute father is actually the father of the child is irrelevant. It is also irrelevant whether he is legally obligated to support

the child, and whether he does in fact contribute to their support. . . .

". . . In other words, the state argues that since in Alabama the needy children of married couples are not eligible for AFDC aid so long as their father is in the home, *it is only fair that children of a mother who cohabits with a man not her husband and not their father be treated similarly.* The difficulty with this argument is that it fails to take account of the circumstances that children of fathers living in the home are in a very different position from children of mothers who cohabit with men not their father; *the child's father has a legal duty to support him, while the unrelated substitute father, at least in Alabama, does not. We believe Congress intended the term 'parent' in §§406a of the Act, 42 U.S.C. §§606(a), to include only those persons with a legal duty of support.*

". . .

"The question for decision here is whether Congress could have intended that a man was to be regarded as a child's parent so as to deprive the child of AFDC eligibility despite the circumstances: (1) that the man did not in fact support the child; and (2) that he was not legally obligated to support the child.

". . .

". . . On the question of whether the man must be legally obligated to provide support before he can be regarded as a child's parent, the State has no such cogent answer. We think the answer is quite clear: Congress must have meant by the term 'parent' an individual who owed to the child a State-imposed legal duty of support.

". . .

". . . We think it apparent that neither Congress nor any reasonable person would believe that providing employment for some man who is under

no legal duty to support a child would in any way provide meaningful economic security for that child." (Emphasis added.)

Had this Court, in its decision in *King*, felt that the decision in *Levy* gave the right to an illegitimate child to obtain support from his natural father, it would have been necessary for the court to reach a different decision as to a certain class of AFDC recipients. If the illegitimate child's father is alive and is under an obligation to support such child, by an extension of the decision in *Levy*, then this might well result in the child and the mother being ineligible for AFDC benefits regardless of whether the illegitimate child's father is actually supporting the child. Undoubtedly this Court did not wish to reach this result and consequently must have rejected the view of extending the doctrine of *Levy* suggested by the concurring opinion. Unless such interpretation is given in the later decision in *King*, then the interpretation sought by Petitioners for the extension of *Levy* would require the reversal of *King*, or in the alternative would result in many present AFDC recipients being declared ineligible for such benefits.

In *Labine* this Court had before it an attack against certain statutes governing intestate succession that barred an illegitimate child from inheriting or sharing in its father's estate. This Court in upholding the validity of such statutory enactments specifically declined to extend the *Levy* and *Glona* rationale into an area to which it felt it did not apply. As Appellees are of the opinion that *Labine* is controlling in the instant case, notice should be taken of the statements found in this Court's opinion which limited further expansion of *Levy* and *Glona:*

". . . The cause of action alleged in Levy was in tort. It was undisputed that Louisiana had cre-

ated a statutory tort . . . so that a large class of persons injured by the tort could recover damages . . . . Under these circumstances the Court held that the State could not totally exclude from the class of potential plaintiffs illegitimate children who were unquestionably injured by the tort. . . . Levy did not say and cannot be fairly read to say that a State can never treat an illegitimate child differently from legitimate offspring. . . .

". . .

". . . Absent a specific constitutional guarantee, it is for that legislature, not the life-tenured judges of this Court, to select from among possible laws. We cannot say that Louisiana's policy provides a perfect or even a desirable solution or the one we would have provided for the problem of the property rights of illegitimate children. Neither can we say that Louisiana does not have the power to make laws for distribution of property left within the State.

We emphasize that this is not a case, like Levy, where the State has created an insurmountable barrier to this illegitimate child. There is not the slightest suggestion in this case that Louisiana has barred this illegitimate child from inheriting from her father. . . ." (Emphasis added.)

In the present case, as in *Labine,* there is no insurmountable barrier to the illegitimate child obtaining support from its natural father. The father could, as mentioned in *Labine,* legitimate the child by marrying the mother; the father could voluntarily undertake to support the child; and the father could even legally become liable for the care of the illegitimate child if he has assumed these responsibilities. *Franks v. Franks,* 138 S.W. 1110 (Tex. Civ. App. 1911, writ ref.).

As this Court concluded in *Labine,* there is nothing in the vague generalities of the Equal Protection and

Due Process Clauses which would empower this Court to nullify the deliberate choices of the elected representatives of the people of Texas or the judicial determinations of the Texas courts as to the common law rule to be followed within its boundaries.

This now brings us to the recent decisions of this Court in *Weber* where certain limitations upon recovery by illegitimate children under the workmen's compensation laws of Louisiana were under attack. This Court, in holding invalid the provision challenged, felt that *Levy,* rather than *Labine,* was the applicable precedent to follow in the case before it. However, the very language of *Weber* discloses that *Labine,* rather than *Weber* or *Levy,* should be controlling and the applicable precedent in the case now under consideration. This Court stated in its opinion that:

> ". . . in Labine the intestate, unlike deceased in the present action, might easily have modified his daughter's disfavored position. . . . The burdens of illegitimacy, already weighty, become doubly so when neither parent nor child can legally lighten them. . . .
>
> ". . .
>
> " . . . the state interest in minimizing problems of proof is not significantly distrubed by our decision. . . ."

The foregoing statements which weigh most heavily in this Court's decision to apply *Levy* rather than *Labine* would be hardly applicable in the present case. There does not exist the insurmountable or difficult barrier to the illegitimate child receiving support from its natural father. In turn, to follow *Levy* in this case would be to trigger a potential torrent of litigation to establish paternity where matters of proof or disproof are significantly difficult and uncertain. This becomes

especially critical when there exists no common law precedent within the jurisprudence of the State of Texas to either determine paternity, or such ancillary issues as support, visitation rights, and the like, and the Legislature has chosen, to date, not to exercise its exclusive right to enact statutory provisions which would offer guidelines.

The foregoing is especially true in view of the language of this Court in *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969), where it was stated that:

> ". . . A legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' Williamson v. Lee Optical of Oklahoma, In., 348 U.S. 483, 489, 99 L.Ed. 563, 573, 75 S.Ct. 461 (1955); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked."

The Appellees in the foregoing comments have for the most part been replying to Appellants' assertions dealing with their challenge to Article 4.02 of the Texas Family Code—an issue not actually before this Court, but one which Appellants seem determined to pursue in their brief. Certainly, however, the decisions in *Levy, Glona, Labine* and *Weber* have little application to the challenge to Article 602 of the Texas Penal Code. Appellants would use this line of reasoning to explore an area even more complicated. In this respect, one could only imagine the difficulties to be encountered by a prosecutor if one of the elements necessary for a conviction under Article 602 of the Texas Penal Code, in a case dealing with the father of an illegitimate child, was to prove "beyond a reasonable doubt" that the accused was the actual father.

This difficulty, standing alone, discloses the rationality of the choice made by the Legislature of Texas in its enactment of Article 602 of the Texas Penal Code. Few prosecutors would elect to proceed with such cases when the question of proving the required elements of guilt was so unlikely or uncertain. The same problem is present even though to a lesser extent, as pertains to Article 4.02 of the Texas Family Code.

Such cases as *Dandridge v. Williams,* 397 U.S. 471, 90 S.Ct. 1153 (1970), set forth that the Fourteenth Amendment gives to the federal courts no power to impose upon the states their views of what constitutes wise economic or social policy. Perhaps it would be wise to view this position with the warning of the dissent in *Reynolds v. Sims,* 377 U.S. 533 (1964), that not every major social ill in this country can find its cure in some constitutional principle. To attempt to cure all real or imagined inequities by innovative judicial expansion of the Fourteenth Amendment is to deprive the legislative branch of government of its very reason for existence or to create some form of competitive arena in which the separation of power doctrine is ignored and wild races are run to see which branch of government comes up with the best political solution.

CONCLUSION

Appellees submit that the Appellants do not have the proper standing to challenge the provisions of Article 602 of the Texas Penal Code and that the decision of the court below should be affirmed. In the alternative, the Appellees submit that the challenged statutory provisions are valid and constitutional enactments of the State of Texas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Pat Bailey, one of the attorneys for the Appellees and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 28 day of July, 1972, I served a copy of the foregoing Motion to Affirm on the Appellants by depositing a copy in the United States mail, postage prepaid, and addressed to the attorney of record for Appellants as follows: Mr. Windle Turley, 2000 McKool Building, 5025 North Central Expressway, Dallas, Texas.

PAT BAILEY

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

CIVIL ACTION 3-4336-B

LINDA R. S., suing on behalf of herself and her minor daughter, and on behalf of all other similarly situated

v.

RICHARD D., and THE STATE OF TEXAS

ORDER OF DISMISSAL

Plaintiff, Linda R. S., sues Richard D. on behalf of herself, her minor daughter and all others similarly situated. She alleges that Richard D. is the father of her minor child, that he has refused to marry her or to support their minor daughter. She prays for a Declaratory Judgment that Article 4.02 of the Texas Family Code is unconstitutional in the exclusion from support of children of unwed parents, that the common law of the State of Texas entitles her child to support by Richard D. and that Richard D. be required to pay a reasonable amount for the support of his child.

Richard D. defaulted. The State of Texas was granted leave to intervene. In its intervention the State contended that Plaintiff had failed to state a cause of action upon which relief could be granted. This Court agrees.

The statute involved, Article 4.02 of the Texas Family Code, provides that:

> Each spouse has the duty to support his or her minor children. The husband has the duty to support the wife and the wife has the duty to support the husband when he is unable to support himself. A spouse who fails to discharge the duty of support is liable to any person who provides necessaries to those to whom support is owed.

There is no statute requiring fathers to support illegitimate children. For this reason Plaintiff contends she and her child are denied equal protection of the law and she asks this Court to declare Article 4.02 uncontitutional, or in the alternative, to hold that it should be interpreted to require fathers to support illegitimate as well as legitimate children.

If the statute is declared unconstitutional the result is there would be no civil statutory requirement for the support of children—legitimate or illegitimate. It is clearly in the interest of the State for children to be supported and in this writer's opinion there is no rational basis for a distinction between legitimate and illegitimate children. But "invalidating legislation is serious business . . ." *Morey v. Doud,* 354 U.S. 457, 474 (1957). To hold that the Equal Protection clause should apply would invalidate a statutory provision of critical importance to Texas' carefully drawn Family Code. I am unwilling to construe the Equal Protection clause in such a way as to bring about the result of having no requirement in Texas law for the support of children. Such action would indeed be a backward step in the State's concept of the duties and obligations of parents and in the social program of the State.

On the other hand, to declare that the statute should be interpreted to require fathers to support illegitimate children is equally untenable. The mere fact that a State has failed to provide a remedy for a wrong does not thereby vest the federal courts with the authority

to legislate by judicial fiat what a state legislative body has either refused or failed to enact. As declared in *Griswold v. Connecticut,* 381 U.S. 479, 482 (1965), the federal courts "do not sit as a super-legislature to determine the wisdom, need and propriety of laws that touch . . . social conditions." While in the opinion of this writer, fathers of illegitimate children should be required to support their children this is a matter to be remedied by the Texas Legislature and not by the Court.

Plaintiff's next contention is that the common law of Texas imposes a duty upon the father of all children to support their offspring.

One of the first statutes[1] passed in Texas adopted the common law of England. Dating back centuries the common law did not require fathers of illegitimate children to support such children. Texas courts have considered the question of support of illegitimate children under the common law and have all held that without a specific statute requiring such support a father was under no duty to do so.

As early as 1887 in *Lane v. Phillips,* 6 S.W. 610, the Supreme Court of Texas declared that the rules of the common law did not impose on a father the duty to support children not born in wedlock.

In the case of *Beaver v. State,* 256 S.W. 929 (Texas Crim. App. 1923), the Court reversed a conviction for the failure of a father to support his illegitimate child and in doing so commented that:

---

[1]Art. 1 Texas Revised Civil Statutes. "The common law of England, so far as it is not inconsistent with the Constitution and laws of this State, shall together with such Constitution and laws be the rule of decision, and shall continue in force until altered or repealed by the Legislature."

"The rule of the common law has been so long established and so uniformly recognized that until the Legislature speaks in unmistakable terms showing an intention to change the rule in this State, we must perforce hold that the statute in question does not apply in the present instance."

Later Texas cases have likewise declared that under the common law a father had no duty to support his illegitimate children. G——— v. P———, 466 S.W. 2d 41 (Texas Civil Appeals, San Antonio 1971), writ ref. n.r.e., *Curtin v. State,* 238 S.W. 2d 187 (Tex. Cr. App. 1950), *Bjorgo v. Bjorgo,* 391 S.W. 2d 528 (Tex. Civ. App. Amarillo—1965), Home of Holy Infancy v. Kaska, 397 S.W. 208 (Sup. Ct. of Tex. 1965).

The place for determining the common law of a State is within the state courts and not in the federal court. In the face of a ruling by the Supreme Court of Texas that the common law did not provide for the support of illegitimate children, it would indeed be presumptuous for this Court to amend the common law by providing that fathers have a duty to support illegitimate as well as legitimate children. Such an amendment of the common law would again be setting this Court up as a legislative body which role this Court does not intend to assume.

Plaintiff next contends that if the common law is not to be interpreted to provide for support of illegitimate children it is a denial of equal protection of the law and should be declared unconstitutional. As in the case of the statutory law of Texas to declare that the common law denies equal protection of the law and therefore is unconstitutional would in effect be nullifying a law which has been in existence for centuries. There is no authority for such action and without authority this Court will not extend the Equal

Protection clause of the Constitution to invalidate the common law.

In addition to a declaratory judgment interpreting Article 4.02 of the Texas Family Code and the common law in such a way as to provide for Plaintiff's minor child Plaintiff prays that Richard D. be required to pay a reasonable amount for the support of his child.

Plaintiff has failed to advance any theory under the Constitution or laws of the United States or of the State under which this Court could require Richard D. to make child support payments. The awarding of such payments and the conditions under which they are to be awarded have customarily been matters provided for by the legislative bodies of the various states and enforced by the State Courts. Rights to child support payments have not been conferred by the laws or Constitution of the United States. This Court has no jurisdiction to enforce Texas support laws. Their enforcement is wholy confined to the State Courts.

For the reasons stated this Court is of the opinion that the Plaintiff has failed to state a cause of action for which relief can be granted.

It is therefore ORDERED, ADJUDGED AND DECREED that Plaintiff's cause of action is dismissed with prejudice at Plaintiff's cost.

SARAH T. HUGHES
United States District Judge

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

LINDA R. S. ET AL. *v.* RICHARD D. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

No. 71-6078. Argued December 6, 1972—
Decided March 5, 1973

Appellant mother of an illegitimate child brought a class action to enjoin the "discriminatory application" of Art. 602 of the Texas Penal Code providing that any "parent" who fails to support his "children" is subject to prosecution, but which by state judicial construction applies only to married parents. Appellant sought to enjoin the local district attorney from refraining to prosecute the father of her child. The three-judge District Court dismissed appellant's action for want of standing: *Held:* Although appellant has an interest in her child's support, application of Art. 602 would not result in support but only in the father's incarceration, and a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another. Pp. 3-6.

335 F. Supp. 804, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion, in which DOUGLAS, J., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, J., joined.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

LINDA R. S. ET AL. v. RICHARD D. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

No. 71-1078. Argued December 6, 1972—
Decided March 6, 1973

[illegible] mother of an illegitimate child brought a class action to [illegible]on the "deserted father" of Art. 602 of the Texas Penal Code providing that any "parent" who fails to support his "children" is subject to prosecution, but which by state judicial construction applies only to married parents. Appellant sought to enjoin the local district attorney from refusing to prosecute the father of her child. The three-judge District Court dismissed appellant's action for want of standing. *Held:* Although appellant has an interest in her child's support, application of Art. 602 would not result in support but only in the father's incarceration, and a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another. Pp. 3-6.

[illegible] F. Supp. 396, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN, J., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 71–6078

Linda R. S. et al., Appellants, v. Richard D. and Texas et al. | On Appeal from the United States District Court for the Northern District of Texas.

[March 5, 1973]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Appellant, the mother of an illegitimate child, brought this action in United States District Court on behalf of herself, her child, and others similarly situated to enjoin the "discriminatory application" of Art. 602 of the Texas Penal Code. A three-judge court was convened pursuant to 28 U. S. C. § 2281, but that court dismissed the action for want of standing.[1] See *Linda R. S.* v. *Richard D.*, 335 F. Supp. 804 (ND Tex. 1971). We postponed consideration of jurisdiction until argument on the merits, 405 U. S. 1064, and now affirm the judgment below.

Article 602, in relevant part, provides: "any parent who shall wilfully desert, neglect or refuse to provide

[1] The District Court also considered an attack on Art. 4.02 of the Texas Family Code, which imposes civil liability upon "spouses" for the support of their minor children. Petitioner argued that the statute violated equal protection because it imposed no civil liability on the parents of illegitimate children. However, the three-judge court held that the challenge to this statute was not properly before it since appellant did not seek an injunction running against any state official as to it. See 28 U. S. C. § 2281. The Court therefore remanded this portion of the case to a single district judge. See 335 F. Supp., at 807. The District Court's disposition of petitioner's Art. 4.02 claim is not presently before us. But see *Gomez* v. *Perez*, *ante*.

for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not more than two years." The Texas courts have consistently construed this statute to apply solely to the parents of legitimate children and to impose no duty of support on the parents of illegitimate children. See *Home of the Holy Infancy* v. *Kaska*, 397 S. W. 2d 208, 210 (Tex. Sup. Ct. 1966); *Beaver* v. *Texas*, 256 S. W. 929 (Tex. Crim. App. 1923). In her complaint, appellant alleges that one Richard D. is the father of her child, that Richard D. has refused to provide support for the child, and that although appellant made application to the local district attorney for enforcement of Art. 602 against Richard D., the district attorney refused to take action for the express reason that, in his view, the fathers of illegitimate children were not within the scope of Art. 602.[1]

Appellant argues that this interpretation of Art. 602 discriminates between legitimate and illegitimate children without rational foundation and therefore violates the Equal Protection Clause of the Fourteenth Amendment. Cf. *Gomez* v. *Perez*, *ante*; *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972); *Glona* v. *American Guarantee & Liability Ins. Co.*, 391 U. S. 73 (1968); *Levy* v. *Louisiana*, 391 U. S. 68 (1968). But cf. *Labine* v. *Vincent*, 401 U. S. 532 (1971). Although her complaint is not entirely clear on this point, she apparently seeks an injunction running against the district attorney forbidding him from declining prosecution on the ground that the unsupported child is illegitimate.

[1] Appellant attached to her complaint an affidavit, signed by an assistant district attorney, stating that the State was unable to institute prosecution "due to caselaw construing Art. 602 of the Penal Code to be inapplicable to fathers of illegitimate children."

Before we can consider the merits of appellant's claim or the propriety of the relief requested, however, appellant must first demonstrate that she is entitled to invoke the judicial process. She must, in other words, show that the facts alleged present the court with a "case" or "controversy" in the constitutional sense and that she is a proper plaintiff to raise the issues sought to be litigated. The threshold question which must be answered is whether "the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?" *Baker v. Carr*, 369 U. S. 186, 204 (1962).

Recent decisions by this Court have greatly expanded the type of "personal stake[s]" which are capable of conferring standing on a potential plaintiff. Compare *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U. S. 118 (1939), and *Alabama Power Co.* v. *Ickes*, 302 U. S. 464 (1938), with *Barlow* v. *Collins*, 397 U. S. 159 (1970), and *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150 (1970). But as we pointed out only last Term, "broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." *Sierra Club* v. *Morton*, 405 U. S. 727, 738 (1972). Although the law of standing has been greatly changed in the last 10 years, we have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing,[3]

[3] It is, of course, true that "Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions," *Sierra Club* v. *Morton*, 405 U. S. 727, 732 n. 3 (1972). But Congress may enact statutes creating legal rights, the invasion of which creates standing,

federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction.[4] See, *e. g.*, *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 166–167 (1972); *Flast* v. *Cohen*, 392 U. S. 83, 101 (1968); *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). Cf. *Laird* v. *Tatum*, 408 U. S. 1, 13 (1972).

Applying this test to the facts of this case, we hold that in the unique context of a challenge to a criminal statute appellant has failed to allege a sufficient nexus between her injury and the government action which she attacks to justify judicial intervention. To be sure, appellant no doubt suffered an injury stemming from the failure of her child's father to contribute support payments. But the bare existence of an abstract injury meets only the first half of the standing requirement. "The party who invokes [judicial] power must be able to show . . . that he has sustained or is immediately in danger of sustaining some *direct* injury *as the result of* [a statute's] enforcement." *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923) (emphasis added). See also *Ex parte Levitt*, 302 U. S. 633, 634 (1937). As this Court made plain in *Flast* v. *Cohen*, 392 U. S. 83 (1968), a plaintiff must show "a logical nexus between the status asserted and the claim sought to be adjudicated. . . . Such inquiries into the nexus between the status asserted

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even though no injury would exist without the statute. See, *e. g.*, *Trafficante* v. *Metropolitan Life Insurance Co.*, — U. S. —, — (1972) (Warren, J., concurring); *Hardin* v. *Kentucky Utilities Co.*, 390 U. S. 1, 6 (1968).

[4] One of the leading commentators on standing has written, "Even though the past law of standing is so cluttered and confused that almost every proposition has some exception, the federal courts have consistently adhered to one major proposition without exception: One who has no interest of his own at stake always lacks standing." K. Davis, Administrative Law Text 428–429 (3d ed. 1972).

by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial power." 392 U. S., at 102.

Here, appellant has made no showing that her failure to secure support payments results from the nonenforcement, as to her child's father, of Art. 602. Although the Texas statute appears to create a continuing duty, it does not follow the civil contempt model whereby the defendant "keeps the keys to the jail in his own pocket" and may be released whenever he complies with his legal obligations. On the contrary, the statute creates a completed offense with a fixed penalty as soon as a parent fails to support his child. Thus, if appellant were granted the requested relief, it would result only in the jailing of the child's father. The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative. Certainly the "direct" relationship between the alleged injury and the claim sought to be adjudicated, which previous decisions of this Court suggest is a prerequisite of standing, is absent in this case.

The Court's prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. See *Younger* v. *Harris*, 401 U. S. 37, 42 (1971); *Bailey* v. *Patterson*, 369 U. S. 31, 33 (1962); *Poe* v. *Ullman*, 367 U. S. 497, 501 (1961). Although these cases arose in a somewhat different context, they demonstrate that, in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another. Appellant does have an interest in the support of her child. But given the special status of criminal prosecutions in our system, we hold that appellant has made an insufficient showing of a direct nexus between the

vindication of her interest and the enforcement of the State's criminal laws. The District Court was therefore correct in dismissing the action for want of standing,[5] and its judgment must be affirmed.[6]

So ordered.

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[5] We noted last Term that "The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process." *Sierra Club* v. *Morton*, 405 U. S. 727, 740 (1972). That observation is fully applicable here. As the District Court stated "the proper party to challenge the constitutionality of Article 602 would be a parent of a legitimate child who has been prosecuted under the statute. Such a challenge would allege that because the parents of illegitimate children may not be prosecuted, the statute unfairly discriminates against the parents of legitimate children." 335 F. Supp., at 806.

[6] Since we dispose of this case on the basis of lack of standing, we intimate no view as to the merits of petitioner's claim. But cf. *Gomez* v. *Perez*, *ante*.

SUPREME COURT OF THE UNITED STATES

No. 71-6078

Linda R. S. et al., Appellants, v. Richard D. and Texas et al. | On Appeal from the United States District Court for the Northern District of Texas.

[March 5, 1973]

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS joins, dissenting.

Appellant Linda R. S. alleged that she is the mother of an illegitimate child and that she is suing "on behalf of herself, her minor daughter, and on behalf of all other women and minor children who have sought, are seeking, or in the future will seek to obtain support for so-called illegitimate children from said child's father." Appellant sought a declaratory judgment that Art. 602 is unconstitutional and an injunction against its continued enforcement against fathers of legitimate children only. Appellant further sought an order requiring Richard D., the putative father, "to pay a reasonable amount of money for the support of his child."

Obviously, there are serious difficulties with appellant's complaint insofar as it may be construed as seeking to require the official appellees to prosecute Richard D. or others or to obtain what amounts to a federal child-support order. But those difficulties go to the question of what relief the court may ultimately grant appellant. They do not affect her right to bring this class action. The Court notes, as it must, that the father of a legitimate child, if prosecuted under Art. 602, could properly raise the statute's under-inclusiveness as an affirmative defense. See *McLaughlin* v. *Florida*, 379 U. S. 184 (1964); *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106 (1949). Presumably, that same

father would have standing to affirmatively seek to enjoin enforcement of the statute against him. Cf. *Rinaldi* v. *Yeager*, 384 U. S. 305 (1966); see also *Epperson* v. *Arkansas*, 393 U. S. 97 (1968). The question then becomes simply: why should only an actual or potential criminal defendant have a recognisable interest in attacking this allegedly discriminatory statute and not appellant and her class? They are not, afterall, in the position of members of the public at large who wish merely to force an enlargement of state criminal laws. Cf. *Sierra Club* v. *Morton*, 405 U. S. 727 (1972). Appellant, her daughter, and the children born out-of-wedlock whom she is attempting to represent have all allegedly been excluded intentionally from the class of persons protected by a particular criminal law. They do not get the protection of the laws that other women and children get. Under Art. 602, they are rendered nonpersons; a father may ignore them with full knowledge that he will be subjected to no penal sanctions. The Court states that the actual coercive effect of those sanctions on Richard D. or others "can, at best, be termed only speculative." This is a very odd statement. I had always thought our civilization has assumed that the threat of penal sanctions had something more than a "speculative" effect on a person's conduct. This Court has long acted on that assumption in demanding that criminal laws be plainly and explicitly worded so that people will know what they mean and be in a position to conform their conduct to the mandates of law. Certainly Texas does not share the Court's surprisingly novel view. It assumes that criminal sanctions are useful in coercing fathers to fulfil their support obligations to their legitimate children.

Unquestionably, Texas prosecutes fathers of legitimate children on the complaint of the mother asserting nonsupport and refuses to entertain like complaints from a mother of an illegitimate child. I see no basis for saying

that the latter mother has no standing to demand that the discrimination be ended, one way or the other.

If a State were to pass a law that made only the murder of a white person a crime, I would think that Negroes as a class would have sufficient interest to seek a declaration that that law invidiously discriminated against them. Appellant and her class have no less interest in challenging their exclusion from what their own State perceives as being the beneficial protections that flow from the existence and enforcement of a criminal child-support law.

I would hold that appellant has standing to maintain this suit and would, accordingly, reverse the judgment and remand the case for further proceedings.

SUPREME COURT OF THE UNITED STATES

No. 71-6078

Linda R. S. et al., Appellants,
v.
Richard D. and Texas et al.

On Appeal from the United States District Court for the Northern District of Texas.

[March 5, 1973]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN joins, dissenting.

By her complaint appellant challenged Texas' statutory exemption of fathers of illegitimate children from both civil and criminal liability. Our decision in *Gomez* v. *Perez*, 409 U. S. — (January 17, 1973), announced after oral argument in this case, has important implications for the Texas law governing a man's civil liability for the support of children he has fathered illegitimately. Although appellant's challenge to the civil statute, as the Court points out, is not procedurally before us, *ante*, — n. 1, her brief makes it clear that her basic objection to the Texas system concerns the absence of a duty of paternal support for illegitimate children. The history of the case suggests that appellant sought to utilize the criminal statute as a tool to compel support payments for her child. The decision in *Gomez* may remove the need for appellant to rely on the criminal law if she continues her quest for paternal contribution.

The standing issue now decided by the Court is, in my opinion, a difficult one with constitutional overtones. I see no reason to decide that question in the absence of a live, on-going controversy. See *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70 (1955). *Gomez* now has beclouded the state precedents relied upon by both parties in the District Court. Thus "inter-

vening circumstances may well have altered the views of the participants," and the necessity for resolving the particular dispute may no longer be present. *Protective Committee for Independent Shareholders of TMT Trailer Ferry, Inc.* v. *Anderson*, 390 U. S. 414, 453–454 (1968). Under these circumstances I would remand the case to the District Court for clarification of the status of the litigation.